# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1897.

## No. 623.

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GEORGE THOMPSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 UNITED STATES OF AMERICA, ss:

*The President of the United States to the honorable the judges of the supreme court of Missouri, greeting:*

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1897, thereof, between the State of Missouri, respondent, and George Thompson, appellant, a manifest error hath happened, to the great damage of the said George Thompson, appellant, as aforesaid, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., *on the* not exceeding thirty days from the date of the citation in said cause, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honoroble Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

Issued at office in the city of Jefferson with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

[SEAL.]

H. C. GEISBERG,
*Clerk Circuit Court United States,*
*Western District of Missouri, Central Division.*

JANUARY 5TH, 1898.

STATE OF MISSOURI, ss:

Allowed by

SHEPARD BARCLAY,
*Chief Justice of the Supreme Court of Missouri.*

*Return to writ.*

UNITED STATES OF AMERICA,
*County of Cole, ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 26th day of January, A. D. 1898.

[SEAL.]

JNO. R. GREEN, *Clerk.*

(Indorsed:) No. . United States circuit court, western district of Missouri, central division. State of Missouri, respt., vs. George Thompson, appellant. Writ of error to the supreme court of the State of Missouri. Returned and filed Jan. 6, 1898. Jno. R. Green, clerk.

2 THE UNITED STATES OF AMERICA.

*To the State of Missouri, greeting:*

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the supreme court of Missouri, wherein George Thompson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, Shepard Barclay, chief justice of the supreme court of Missouri, this fifth day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

SHEPARD BARCLAY,
*Chief Justice of the Supreme Court of Missouri.*

UNITED STATES OF AMERICA,
*Central Division of the Western District of Missouri, ss:*

I hereby acknowledge due service of the within citation, this 8th day of January, A. D. 1898.

EDWARD C. CROW,
*Attorney for Defendant in Error.*

(Indorsed:) United States circuit court, western district of Missouri, central division. State of Missouri, respt., vs. George Thompson, appellant. Citation. Filed Jan. 6, 1898. Jno. R. Green, clerk.

3 STATE OF MISSOURI, RESPONDENT, *vs.* GEORGE THOMPSON, APPELLANT. } In the Supreme Court of the United States.

*Assignment of errors.*

Comes now George Thompson, the above-named appellant, by his counsel, and moves this court to set aside the judgment rendered by the honorable supreme court of Missouri in this cause on the 16th day of November, 1897, and to grant him a new trial for the reasons following, to wit:

The court erred in sustaining the trial court in the admission of certain handwritings, as appears from the record on pages 309–319, inclusive, for the purpose of comparison under section 8944a, session laws of Missouri, 1895; because in violation of Art. I, sec. 10, Constitution United States, and in violation of Art. II, sec. 15, constitution of the State of Missouri; because the same is ex post facto and void.

Wherefore, appellant prays that the judgment rendered as aforesaid be set aside and a new trial granted.

Respectfully submitted.

MARION C. EARLY,
*Attorney for Appellant.*

(Indorsed:) State of Missouri, respondent, vs. George Thompson, appellant. Assignment of errors. Filed Jan. 6, 1898. Jno. R. Green, clerk.

* * * * * * *

6 SATURDAY, *November 24th, 1894.*

On this day the grand jury return to the bar, and through their foreman deliver the following indictment as a true bill, to wit:

STATE OF MISSOURI, *City of St. Louis, ss:*

St. Louis criminal court, November term, 1894.

The grand jurors of the State of Missouri within and for the body of the city of St. Louis, now here in court duly empannelled, sworn, and charged, upon their oath present that George Thompson, late of St. Louis, in the city of St. Louis aforesaid, on the twenty-ninth day of September, in the year of our Lord eighteen hundred and ninety-four, at St. Louis, in the city of St. Louis aforesaid, and State of Missouri aforesaid, with force and arms in and upon one Joseph M. Cunningham in the peace of the State then and there being, feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought did make an assault, and that he, the said George Thompson, then and there wickedly contriving and *intenting* to poison the said Joseph M. Cun-

7 ningham, feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought to kill and murder, did then and there feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought give and administer to the said Joseph M. Cunningham a large quantity of a certain deadly poison called strychnine, which was then and there mixed and mingled with a certain quantity of cheese, the said George Thompson then and there knowing that the said strychnine was then and there mixed and mingled with the said cheese, and then and there well knowing that the said strychnine was a deadly poison and was likely to kill the said Joseph M. Cunningham, and then and there feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought designing and intending that the said Joseph M. Cunningham should then and there eat thereof and sicken and die; and that the said Joseph M. Cunningham, then and there not knowing that there was any strychnine or any other poisonous or hurtful substance mixed and mingled with the said cheese, did then and there receive of the said George Thompson the said strychnine so mixed and mingled as aforesaid with said cheese, and did then and there eat a large quantity of said strychnine so mixed and mingled as aforesaid with said cheese and swallow down the same into his body, whereby he, the said Joseph M. Cunningham, then and there of the said strychnine became mortally sick in his body, and the said strychnine and the said

mortal sickness by said strychnine occasioned as aforesaid did then and there instantly die.

And so the grand jurors aforesaid upon their oaths aforesaid do say, that the said George Thompson the said Joseph M. Cunningham, at the time and at the place aforesaid, in the manner and by the means aforesaid, feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

WILLIAM ZACHRITZ,
*Circuit Attorney.*

8 No. 47.

St. Louis criminal court, November term, 1894.

STATE OF MISSOURI
*vs.*
GEORGE THOMPSON. } Murder 1″ degree.

A true bill.

ALEXANDER EUSTON, *Foreman.*

Filed November 24″, 1894.

HUGH T. PATTISON,
*Clerk St. Louis Criminal Court.*

Witnesses: Mrs. J. M. Cunningham, F. S. Beckett, Rev. W. Short, E. Schmidt, S. Dicto, N. Simons, P. Waitz, D. Holly, J. B. Lucas, Dr. J. C. Mulhall, Dr. Keber, H. Steinberg, A. Johnson, Dr. I. N. Love, L. Ruckersfeldt, G. Davis, Dr. C. A. Frank, Dr. Chas. R. Sanger, Off. Joseph Gocking, Capt. O'Malley, Off. Berry, Off. Harrington.

Copy of indictment delivered defendant December 4, 1894, 12.15 p. m.
ARCHIBALD CARR, *Clerk.*

TUESDAY, *December 6″, 1896.*

THE STATE OF MISSOURI
*vs.*
GEORGE THOMPSON, } Murder 1″ degree.

This day the defendant, being in custody, is brought into court by the sheriff, and thereupon on motion of the circuit attorney, is arraigned upon the indictment against him and pleads not guilty as charged therein, and for trial puts himself upon the country and the State does the same.

9 MONDAY, *February 17″, 1896.*

STATE OF MISSOURI
*vs.*
GEORGE THOMPSON. } Murder 1″ deg'.

There is this day filed with the court the mandate of the supreme court of the State of Missouri, remanding said cause and ordering a new trial

thereof, whereupon it is ordered by the court that said cause be continued for the State as an affidavit, the defendant consenting thereto, and that said cause be set and docketed for trial on the 9″ day of March, A. D. 1896.

* * * * * * *

11 And at the May term of court, A. D. 1896, the following proceedings were had, to wit:

MONDAY, *May 25″, 1896.*

THE STATE OF MISSOURI
*vs.*
GEORGE THOMPSON. } Murder 1″ degree.

This day the defendant, being in custody, is brought into court by the sheriff; the attorney for the defendant also comes into court. Thereupon, on motion of the circuit attorney, said defendant is arraigned upon the indictment against him, and said defendant, waiving the reading of said indictment against him, pleads not guilty as charged therein, and for trial puts himself upon the country, and the State does the same; and both parties being ready for trial, it is ordered that a jury come.

Thereupon came a jury, to wit: Jno. B. Cummings, Adam Stadler, Theo. T. Deming, Louis A. Bolin, Wm. N. McMillaw, Frederick W. Hassebrock, Chauncey W. Thomas, Thomas Manser, Frederick L. Ferber, Edward F. Asborne, Edward S. Martin, and John A. Peck.

Twelve good and lawful men, duly elected, tried, and sworn the issues herein well and truly to try and a true verdict render according to the law and the evidence.

Thereupon the trial of this cause proceeds and the testimony of witnesses is partly heard, but not being concluded at the hour of adjournment, further proceedings herein are deferred until to-morrow morning.

12 TUESDAY, *May 26″, 1896.*

THE STATE OF MISSOURI
*vs.*
GEORGE THOMPSON. } Murder 1″ degree.

This day the defendant, being in custody, is again brought into court by the sheriff, the attorney for the defendant comes into court, and the circuit attorney comes, representing the State. The jurors aforesaid also come into court, and thereupon the trial of this cause proceeds. The testimony of witnesses is further heard, but not being concluded at the hour of adjournment, further proceedings herein are deferred until to-morrow morning.

WEDNESDAY, *May 27″, 1896.*

THE STATE OF MISSOURI
*vs.*
GEORGE THOMPSON. } Murder 1″ degree.

This day the defendant, being in custody, is again brought into court by the sheriff, the attorney for the defendant comes into court, and the

circuit attorney comes, representing the State. The jurors aforesaid also come into court, and thereupon the trial of this cause proceeds. The testimony of witnesses is further heard, but not being concluded at the hour of adjournment, further proceedings herein are deferred until to-morrow morning.

THURSDAY, *May 28", 1896.*

THE STATE OF MISSOURI
*vs.*
GEORGE THOMPSON. } Murder 1" degree.

This day the defendant, being in custody, is again brought into court by the sheriff, the attorney for the defendant comes into court, and the circuit attorney comes, representing the State. The jurors aforesaid also come into court, and thereupon the trial of this cause proceeds. The testimony of witnesses is further heard and concluded. Thereupon further proceedings herein are deferred until to-morrow morning.

13 FRIDAY, *May 29", 1896.*

THE STATE OF MISSOURI
*vs.*
GEORGE THOMPSON. } Murder first degree.

This day the defendant, being in custody, is again brought into court by the sheriff, the attorney for the defendant comes into court, and the circuit attorney comes, representing the State. The jurors aforesaid also comes into court, and thereupon the trial of this cause is resumed. The jurors receive their instructions from the court, and the arguments of counsel is heard and concluded.

Thereupon the cause is submitted to the jury for a verdict in the premises, and they retire to consider thereof, in charge of a deputy sheriff duly sworn according to law to keep the jurors together in the rooms set apart for juries of this court, and not permit anyone to speak to or communicate with them, nor do so himself unless by order of the court, or to ask them if they have agreed upon a verdict. And said jurors having agreed upon a verdict are conducted into court by the officer having them in charge, and in presence of the said defendant render the following as their verdict, to wit:

STATE OF MISSOURI
*vs.*
GEORGE THOMPSON. } On indictment for murder in the first degree.

We, the jury in the above-entitled cause, find the defendant guilty of murder in the first degree, as by the indictment he stands charged.

EDWARD F. OSBORNE, *Foreman.*

And said jurors announce in open court that the above verdict just read is their true verdict in this cause, are ordered by the court discharged from further consideration herein.

TUESDAY, *June 2", 1896.*

THE STATE OF MISSOURI
*vs.*
GEORGE THOMPSON. } Murder 1" degree.

14 This day the defendant by his attorney files his motion for a new trial herein.

FRIDAY, *July 3", 1896.*

THE STATE OF MISSOURI
*vs.*
GEORGE THOMPSON. } Murder 1" degree.

It is this day ordered by the court that the motion for a new trial in the above-entitled cause be continued, for want of time to hear and determine the same.

And at the July term of court, A. D. 1896, the following proceedings were had, to wit:

TUESDAY, *July 21", 1896.*

THE STATE OF MISSOURI
*vs.*
GEORGE THOMPSON. } Murder 1" degree.

Now, at this time the court having duly considered the motion for a new trial herein, and being fully advised thereof, doth overrule the same.

THURSDAY, *July 23", 1896.*

THE STATE OF MISSOURI
*vs.*
GEORGE THOMPSON. } Murder 1st degree.

This day the defendant, by his attorney, files his motion in arrest of judgment herein.

MONDAY, *July 27", 1896.*

THE STATE OF MISSOURI
*vs.*
GEORGE THOMPSON. } Murder 1" degree.

Now, at this time the court having duly considered the motion in arrest of judgment herein, and being fully advised thereof, does overrule the same.

Thereupon the defendant being in custody is brought into court by the sheriff to receive sentence in accordance with the verdict of the jury heretofore rendered against him. Thereupon, the said defendant is demanded by the court if he has or knows anything to say why the court should not now proceed to pass sentence of death upon him,

15 in accordance with the verdict heretofore rendered against him, and having nothing to say, it is considered and adjudged by the court that the said defendant, George Thompson, for his offence of

murder in the first degree, as charged in the indictment and in pursuance of the verdict heretofore rendered against him, be taken from this place to the place whence he came, there to remain in custody of the sheriff until Friday, the 28" day of August, A. D. 1896, on which said 28" day of August, A. D. 1896, he be taken to the usual place of execution in the city of St. Louis, and there on the said Friday, the 28" day of August, A. D. 1896, between the hours of 6 o'clock a. m. and 12 o'clock m., in the forenoon of said day he be hanged by the neck until he be dead.

And it is ordered by the court that the clerk of this court issue a warrant, commanding the sheriff of the city of St. Louis to carry this judgment and sentence into execution.

Whereupon the defendant, by his attorney, prays for an appeal to the supreme court of the State of Missouri, from the judgment and sentence herein rendered against him, which said appeal is by the court granted. Thereupon it is ordered by the court that said appeal shall operate as a stay of execution on the judgment herein, until further orders of the said supreme court.

* * * * * * *

99 JOHN B. KEBER, being duly sworn on behalf of the State, testified as follows:

Direct examination by Mr. BISHOP:

Q. Please state your name.

A. John B. Keber.

Q. What is your business?

100 A. Physician.

Q. Where is your office?

A. 1319 Union Trust Building.

Q. And where is your residence, Doctor?

A. 3832 Pine.

Q. How long have you been living at that place?

A. About eight years.

Q. Then you were residing there in September, 1894, the 30th of last September.

A. Yes, sir.

Q. Do you know the druggist, Mr. Leo Ruckersfeldt?

A. Yes, sir.

Q. Do you know this defendant at all?

A. No, sir.

Q. I will ask you to state whether in September, 1894, you had a colored man in your employ.

A. No, sir.

Q. I will ask you to look at this paper [handing witness paper marked Exhibit A]; you have seen that paper before, have you, Doctor?

A. Yes, sir.

Q. I will ask you to state, Doctor, whether that paper was written by you or by your direction?

A. Neither.

Q. Do you remember when you first saw it?

A. I think I do. I think I saw it for the first time in the coroner's office.

Q. At the time of the inquest on the body of the sextor of St. Peter's Church?
A. Yes, sir.
Q. Is there any other Keber living, or was there at that time, at 3832 Pine street?
A. My father.
Q. Is he a physician?
A. No, sir.
101 Q. Did you ever give anybody any order on Mr. Ruckersfeldt about that time for strychnine?
A. No, sir.
Q. Either this defendant or any other person?
A. Nobody.
Q. Did you receive any from Mr. Ruckersfeldt?
A. Did I receive any?
Q. Yes, sir.
A. No, sir.
Q. You say you had no connection of any kind whatsoever with this paper?
A. No connection whatever.
Q. You spell your name K-e-b-e-r—only one "b" in it?
A. Yes, sir.
Q. I will ask you to state, Doctor, what that character means in there (3)?
A. It means one drachm.
Q. How much is that?
A. Sixty grains.

Cross-examination waived.

LEO RUCKERSFELDT, being duly sworn on behalf of the State, testified as follows:

Direct examination by Mr. BISHOP:

Q. Please state your name.
A. Leo Ruckersfeldt.
Q. What is your business?
A. Druggist.
Q. Where is your place of business?
A. Corner Laclede and Spring avenue.
Q. Leclede and Spring?
A. Yes; northeast corner Leclede and Spring avenue.
Q. Were you in business there in September, 1894?
A. Yes, sir.
102 Q. I will ask you to look at this paper marked Exhibit "A" and state whether you have seen it before [handing witness Exhibit "A"].
A. Yes, sir; I have seen that before.
Q. When did you first see that paper, Mr. Ruckersfeldt?
A. I seen that on Wednesday, the 26th of September, between twelve and one o'clock.
Q. 1894?
A. Yes, sir.

Q. State under what circumstances you saw it.

A. It was brought to me by a colored boy in a sealed envelope. I opened the envelope and looked at it, and it contained an order for one drachm of strychnine, signed by "Dr. Kebber."

Q. And what did you do then?

A. I put up a sealed package of strychnine in a box, sealed it and tied it up, handed it to the boy, received the money for it, and the boy went out, and there was no more said about it.

Q. Were you acquainted with Dr. Keber at that time?

A. I was not.

Q. You had never seen his handwriting?

A. No.

Q. But acting upon that as an order from him you put up the strychnine and delivered it to this messenger?

A. Yes, sir.

Q. How much strychnine did you give him, Mr. Ruckersfeldt?

A. There was about fifty grains in the bottle.

Q. That calls for a drachm, does it not [referring to Exhibit "A"]?

A. No; sixty grains is a drachm. There was some of it taken out of the bottle—a few grains.

Q. Well, I just wanted to understand—is strychnine put up in bottles?

A. Yes, sir; one-drachm bottles.

Q. And part of it had been taken out?

A. Yes; a few grains had been removed from the original package.

103 Q. You gave him about fifty grains instead of a full drachm?

A. Yes, sir.

Q. Was there anything said by the boy who came for the strychnine other than handing you the order?

A. No, sir.

Q. And you gave the package back to him?

A. I gave the package to him, sealed up.

Q. Sealed in what way?

A. Put it in a paper box—a paper prescription box.

Q. Then you filed the order?

A. Filed the order, just according as I got it in.

Q. To whom did you give the order afterwards?

A. One of the officers called for it.

Q. That was after the death of Cunningham?

A. That was on Monday morning.

Q. Monday morning?

A. Monday after, the 30th.

Q. This is the same order presented to you upon which you gave the strychnine (Exhibit "A")?

A. Yes, sir; signed by me—my signature.

Q. With a memorandum made by you on there at the time you received it?

A. Yes, sir.

Cross-examination by Mr. EARLY:

Q. Mr. Ruckersfeldt, did you take any particular notice of the person who presented that order at your store?

A. Well, not any more than I would to any of the other boys that would come around the store occasionally with orders.

Q. At that time, Mr. Ruckersfeldt, were you acquainted with this defendant?

A. Yes, sir.

Q. Was it he who presented this order?

A. Nos, sir.

Q. Are you able to swear that?

A. Oh, I am positive of it, because I know the defendant for

104 almost a year and over.

Q. And you are positive that he is not the man that presented this order?

A. He is not the man.

Redirect examination by Mr. BISHOP:

Q. How long had you known Thompson?

A. I had known Thompson—well, about a year or year and a half previous to when this happened.

Q. Where did you know him, Mr. Ruckersfeldt?

A. Well, he used to work for Rev. Short.

Q. Had he been to the drug store often?

A. Well, he was there maybe once or twice or three times a week.

Q. Came quite often?

A. Came quite often.

Q. Just on errands for Dr. Short and his family?

A. He came on erronds for Dr. Short and his family; yes, sir.

Q. You were sure that you knew him?

A. Oh, yes; certainly.

Q. And did you know him by name?

A. I knew his first name was George, but I didn't know his other name—his surname.

* * * * * * *

115 F. S. BECKETT, being duly sworn on behalf of the State, testified as follows:

Direct examination by Mr. BISHOP:

Q. Please state your name?

A. F. S. Beckett.

Q. Mr. Beckett, what is your business?

A. Musician.

Q. How long have you lived in St. Louis, Mr. Beckett?

A. Two years, I think; almost two years.

Q. Are you employed at the present time?

A. Yes.

Q. In what capacity?

A. Organist.

Q. Where?

A. At the Church of St. Peter the Apostle.

Q. Where is that, Mr. Beckett?

A. Pendleton avenue.

Q. In September, 1894, were you an organist?

A. Yes, sir.

Q. Where were you engaged at that time?
A. St. Peter's Church.
Q. Where is that?
A. Spring and Lindell.
Q. How long had you been the organist of that church, Mr. Beckett, at that time?
A. From the 1st of April.
Q. 1894?
A. Yes.
Q. Did you know the defendant, George Thompson, at all?
A. No; I never saw him.
Q. Did you know Joseph M. Cunningham in his lifetime?
A. Yes.
Q. What was Mr. Cunningham doing at the time?
116 A. He was janitor of the church where I was organist.
Q. Had he been engaged there in that capacity during the whole time you were the organist?
A. Yes, sir.
Q. Did you see him on the 29th of September; Saturday?
A. Yes; I saw him.
Q. Were you at the church?
A. Yes, sir.
Q. What time did you go to the church that day, Mr. Beckett?
A. I went to the church first about two o'clock; then I went again about—oh, some time after two; I don't know just what time it was.
Q. Where were you when you were in the church; what part of it were you in?
A. You mean the first time?
Q. No; I mean the last time you were there.
A. I went right in to the organ.
Q. Where was the organ situated?
A. The left-hand side of the chancel.
Q. Is that the front part of the church?
A. The back part.
Q. What street did you enter the church from?
A. Lindell avenue.
Q. It fronted on Lindell Avenue, did it?
A. Yes.
Q. So to go in to the organ you go clear through the church?
A. No; I went in from Lindell avenue up a sidewalk, and then went in through a side door.
Q. When you went in the church at four o'clock did you see Cunningham?
A. I saw him on the lawn in front of the church.
Q. What was he doing at that time?
A. He was sprinkling the lawn and working, fixing up for Sunday.
117 Q. Now, when did you next see Cunningham after you had gone into the church and gone to the organ?
A. The next time was when he—he had come into the church and called me.

Q. Did he come up to the organ?
A. No; he come to the door and called me. Then I went back to the choir room, where he was.
Q. Where was the choir room?
A. The choir room is on the other side of the chancel. The organ is on one side and the choir room on the other, and he called to me over the chancel.
Q. Did you go to him?
A. I went to him; yes, sir.
Q. Now I will ask you to state, Mr. Beckett, all that passed between you and Cunningham at that time; all that transpired from the time he called you now and you went to him.
A. Well then, we went down in the cellar, and he carried the lunch with him.
Q. Now, what did he have with him?
A. He had a basket, and the lunch was opened down in the cellar; down in the basement of the church.
Q. What did it consist of?
A. Consisted of a bottle of beer, a charlotte russe, crackers and cheese, and a pear. I don't remember anything else.
Q. Well, now, just state all that was said and all that occurred there.
A. Well, he told me there that Mrs.——
Mr. EARLY. I desire to object now to any conversation that occurred as appertaining to the eating of this lunch, and I ask that the jury be excluded until the witness's statement has been heard and passed upon.
Mr. BISHOP. That statement has been passed upon by a higher authority, Mr. Early.
Mr. EARLY. Well, that is all right, Mr. Bishop. I have a right to——
118 The COURT. Let the jury be retired to the jury room.
(Jury retires.)
Q. (By Mr. BISHOP.) Well, now, just state all that was said and all that occurred there, just as fully as you remember.
A. He said that the lunch was sent by Mrs. McLean, by her man, and also stated the reason the lunch was sent was because he at one time had brought her some mushrooms, and she appreciated the fact that he had given them to her and sent the lunch.
Mr. EARLY. Now, if the court please, I object to the admission of that testimony.
Mr. BISHOP. Wait a minute. I am not through, Mr. Early.
The COURT. Let us have the full matter drawn out and passed upon all together.
Mr. EARLY. All right.
Q. (By Mr. BISHOP.) Did he state at that time who had brought the lunch?
A. Yes; Mrs. McLean's man.
Q. Did he mention his name?
A. Didn't mention his name; no.
Q. Did you know at the time who Mr. McLean's man was?
A. Well, Mrs. McLean's man was, I understand, Thompson.
Q. I say did you know at that time?
A. Yes; I knew at that time that he was the man that worked for her.

Q. And was formerly sexton of this church?

A. Yes.

Q. Well, now, just go on and state what more he said and what you did.

A. Well, it's so long ago I've forgotten, unless I am reminded, what really was said. I can't think of it just at present.

Q. Well, after he said this what did you do?

A. I went on and commenced to eat the lunch.

Q. Did you eat any part of it?

A. Yes; I ate the charlotte russe. I ate first some crackers and
119 cheese, and found it so bitter I threw mine in the furnace; and I spoke about it then, about the cheese being bitter, and I ate some more of the lunch—the charlotte russe and the pear, half of the pear at least—to try to take the taste away, the bitter taste.

Q. Did you notice whether Cunningham ate any of the crackers and cheese?

A. He ate a good many of the crackers, and cheese also.

Q. Did he make any remark about the taste of the cheese?

A. Yes; he spoke about it being bitter and wondering why it was, and I thought it was in the bad quality of the cheese. He went on to say that the reason he thought there was so many crackers and so much cheese sent was because when he was a coachman for George D. Barnard, Mrs. Barnard knew he was very fond of crackers and cheese, and often after a long drive would have crackers and cheese there for him on his return, and he supposed that Mrs. Barnard must have told Mrs. McLean, as they were friends, about this, and she, of course, would send quite a number of crackers and cheese.

Q. Well, now, after you ate a part of the lunch what happened; what did you do then?

The COURT. I understand that part of it is objected to.

Mr. EARLY. Yes, sir; that I object to.

Q. (By Mr. BISHOP.) Did you have any conversation now with Cunningham afterwards—after you began to feel the effects of this stuff, as you have heretofore stated, did you see Cunningham again and have any conversation with him?

A. Yes, sir; I went upstairs and commenced to practice, and then he came up afterwards, and was saying he felt bad and speaking about his symptoms, and on comparing notes I told him that I had the same symptoms and there must be something seriously wrong.

Q. What did he say about his symptoms?

A. Well, he simply said he was feeling sick, and I went out and sat—got as far as a little office, and he came out after me and said he had great trouble in getting out and was very anxious to call somebody.

Q. Well, you called for assistance then, did you?

120 A. Yes; we both called, and then some men that were working at the next house, next door, came over.

Q. Did you hear Cunningham say anything more after that?

A. Well, no; only saying how he was in such agony; that's all.

Q. Do you remember, Mr. Beckett, whether or not he said it was a colored man?

A. No; he didn't say it it was a colored man. He just simply mentioned it was Mrs. McLean's man.

By the COURT:

Q. Did he designate the man in any way; just simply said "Mrs. McLean's man?"

A. Mrs. McLean's man.

Q. Did he designate whether he was a colored man or not?

A. No; I don't think he did; just called him Mrs. McLean's man.

Q. And at that time you knew who Mrs. McLean's man was?

A. I understood Mrs. McLean's man was the man that was formerly janitor of the church.

Q. And in speaking about how she came to send him the lunch, what did he say in that regard?

A. He said that sometime before he had brought to her a basket of mushrooms to cook, but it was refused. Mrs. McLean, when she heard of it, wanted to send something to him for bringing in such a large basket of mushrooms, so she sent over this lunch.

Q. Mrs. McLean sent Cunningham this lunch on account of him having taken her a basket of mushrooms?

A. Yes, sir.

Q. Was that the reason, as told by the man?

A. When he brought the lunch the man told him the reason Mrs. McLean had sent it.

Q. That was the reason Mrs. McLean had sent the lunch, you mean?

A. Had sent the lunch; yes, sir.

121 Mr. EARLY. Now, if the court please, I object to the introduction of that testimony on the ground that the corpus delicti of the case has not yet been established. The corpus delicti in a case of homicide consists necessarily of two parts—first, the death of the deceased; second, the proof of criminal agency. So far there has been no criminal agency established. The testimony to be admitted is a part of the res gestae, and I understand the law in regard to that subject, evidence must be introduced to qualify or to illustrate the main question in issue. The fact that this statement was made as they were beginning to eat the lunch, of a lunch having been brought at a previous time, is not the establishment in itself of the body of the case merely, but it is simply a narration of what had been done before. There is absolutely nothing to connect it with the case. It is fragmentary and incomplete. It mentions no name. It merely is introducing an imperfect and incomplete statement, wholly the narration of something which had been already done. I think that on those grounds the question is purely one of hearsay. I desire to call the court's attention to the ruling of Judge Gantt, of the supreme court, on this identical point [handing Judge Gantt's opinion to the court].

By Mr. EARLY:

Q. He just simply made that statement, "Mrs. McLean's man?" I believe that is the statement, isn't it? That is all that was said?

A. Yes.

Q. And you of your own knowledge didn't know anything about who was meant, did you? Isn't that what you said?

A. I can't remember now whether he said the "hired man" or "man."

Q. Well, I know. I believe you stated you didn't know anything about who was meant?

A. Who was meant?

Q. Yes; of your own knowledge; not what you heard or believed,
122 anything of that sort, or understood; I mean of your own knowledge. I think that is what you stated, isn't it?

A. Yes; I knew who he meant when he said "Mrs. McLean's man," because I knew who Mrs. McLean's man was.

Q. I thought you said you didn't know this man?

A. I didn't know him, but I knew who he was.

Q. You didn't know whether she had one man or two, did you?

A. The one he meant.

Q. Just wait; you can not draw inferences.

A. I only heard of one man she had.

Q. Well, if she had more you didn't know anything about it?

A. If she had more I didn't know anything about it.

Q. Did she ever tell you herself that she had more?

A. I don't think she ever mentioned the subject to me at all.

Q. Then all you know about it is what you heard?

A. What I heard; yes.

The COURT. The testimony is clearly admissible under this ruling of the supreme court. There is no question about that.

(To which ruling of the court defendant then and there duly excepted.)

The jury was brought in and the direct examination of witness proceeded as follows:

By Mr. BISHOP:

Q. Now, to go back, Mr. Beckett, to where we were, I understood you to say that while you were playing at the organ Mr. Cunningham appeared at the door on the opposite side and called you?

A. Yes.

Q. And you went to him and you went downstairs into the choir boys'——

A. Basement.

Q. Basement, downstairs, and he had a basket of lunch there?

A. Yes; he carried the basket down with him.

123 Q. And he asked you to join him in eating the lunch?

A. Yes.

Q. This, you say, was about four o'clock?

A. I should think it would be about four.

Q. Well, it was in that neighborhood?

A. Yes, sir.

Q. And this lunch, you say, consisted of crackers and cheese, a bottle of beer, charlotte russe, and a *pair*?

A. Yes.

Q. And you ate a small part of the cheese, found it bitter, and you rejected it?

A. Yes, sir.

Q. And he ate the crackers and cheese?

A. He ate of the crackers and cheese principally, I think.

Q. And you ate of the charlotte russe and part of the pear?

A. Yes.

Q. Did you drink any of the beer?

A. Yes, at first. There was one glass. He poured out a glass of beer; I drank that; then gave him the glass, and he drank the second glass slowly while he was eating the crackers and cheese.

Q. Now, Mr. Beckett, I will ask you to state all that Mr. Cunningham said to you at that time with reference to this lunch.

A. He said that the lunch had been sent by Mrs. McLean, by her man, on account of some mushrooms that the janitor had offered to her cook; a basket of mushrooms that he had picked one morning and offered them to Mrs. McLean's cook, and Mrs. McLean, according to this man's story, appreciated that and had sent him the lunch.

Q. Did he say who brought the lunch?

A. That Mrs. McLean's man had brought it.

Q. Did he say when he had brought it?

A. That afternoon.

Q. Did he say who had told him about Mrs. McLean appreciat-
124 ing the mushrooms and had sent him the lunch in consideration of it?

A. He said that Mrs. McLean's man had told him when he brought the lunch.

Q. Now, did you begin to eat the lunch right away?

A. I drank a glass of beer first and then ate some crackers and cheese—yes; I think I had two crackers and put a piece of cheese between them, made a sandwich, and had two or three mouthfuls and found it bitter and threw it in the stove. Then I ate the charlotte russe and then part—half of the pear. I cut the pear in half and left half of it with him and took the other half and was eating it on my road upstairs, and then left him eating the lunch, still eating.

Q. About how long do you think you were in the basement of the church there with him at that time?

A. Oh, we weren't there but a short time. I was there but a short time. I was in a hurry. I couldn't have been down there with him more than about ten minutes at the outside.

Q. Did you see him open the bottle of beer?

A. No; he took the bottle in another part of the cellar and opened it.

Q. You didn't notice what kind of a stopper it had, did you?

A. No; tinfoil around the top.

Q. Now, how soon, Mr. Beckett, after you returned to the organ did you begin to feel sick?

A. Why, almost immediately. I found trouble in playing the pedals of the organ.

Q. With your feet?

A. Yes; my legs were cramped and I couldn't use them properly, and I couldn't understand why it was.

Q. Did you have any sickness of the stomach?

A. No; I had no sickness. I had a slight dizziness, but not of any great amount.

Q. Then the effect was dizziness in the head and inability to control your lower limbs?

A. Yes.

125 Q. Well, now, how soon after you got to the organ and begun to feel these symptoms was it before you saw Cunningham?

A. Why, it was very soon—a very short time.

Q. Now, where did you see him first then?

A. He come across the chancel and sat down in a choir bench—choir stall—by the keyboard of the organ. This was to the left of the keyboard. The keyboard of the organ projects from the organ, and this bench is to the left of the keyboard.

Q. Did he come directly from the same place where you had come from?

A. Yes.

Q. Well, now, how soon after he sat down in this choir stall did you notice anything peculiar about him?

A. As soon as he come up he told me that there was something wrong with him.

Q. Did you notice his appearance?

A. I didn't notice anything unusual.

Q. Had you already stopped playing then?

A. Yes; as soon as he came up and spoke to me I stopped playing.

Q. Well, now, what did you and he do then?

A. Well, when he commenced telling me that there was something wrong with him, that he was sick, and there must be something wrong with the lunch, and he thought he ought to have a doctor, would like a doctor or something, I said I'd go down and get one for him. Then I found great trouble in getting up, and couldn't leave the organ bench. I was cramped, my lower limbs, and then when I did start I had to go right over; I couldn't stop; I had no control of my lower limbs at all, and I got as far as the little office at the side of the church and there I had another—the cramps came on again worse than ever, and I got as far as—I had to sit down, and while I was sitting there the janitor came up.

Q. That was Cunningham?

126 A. Yes; and he sat in another chair, and then he stiffened out, his jaws came together, and he got so he couldn't speak, and his muscles all contracted and then he would relax—the muscles would relax—and told me he was suffering great agony, and also great agony in his back as if somebody was hitting him or something, and he couldn't understand it, and he went out for help, and then after he had called a few times he had another convulsion, and his muscles contracted and he was very rigid, and didn't move after that.

Q. Then what did you do, Mr. Beckett?

A. I went out on the front steps, and then some men came.

Q. Did you call for help?

A. I called for some men that were working next door.

Q. Now, what occurred after these workmen came?

A. I think one went for a doctor. There was two, I think, I sent. First, I think, was a colored man come, and I sent him for a doctor, and then a couple of others come, and I sent them for a doctor; told them to get anyone they could. Then some other men come. There were quite a number, and I sent some men in to him, to the janitor, and then the doctor come.

Q. Do you remember what doctor?

A. Dr. Love come first.

Q. What became of you then, Mr. Beckett?

A. Well, they give me some hot water, and put some medicine in the hot water, and I kept drinking the hot water and gradually threw it all up, and with a man each side of me I walked up and down the sidewalk

at the side of the church, and then Dr. Love, I think, he brought his carriage, or it was there, and we drove over to the Marion-Sims Hospital.

Q. You were taken to the Marion-Sims Hospital?

A. Yes; Dr. Love drove me over there.

Q. How long were you there?

A. Till Monday morning.

Q. Were you present at the inquest?

A. Yes.

Q. Did you see Cunningham's body?

127 A. Yes.

Q. Was that the same Cunningham about which you have been speaking as the sexton of the church?

A. Same man.

Q. He was dead then?

A. Yes; I saw him in the morgue.

Q. Do you know, of your own knowledge, whether he was dead before you left the church, or did you know at that time?

A. Well, the last I saw of him he was perfectly rigid and stretched out straight, with his shoulders on the chair, his feet straight out in front of him, just resting with his shoulders on the chair. He had stiffened out and gradually slid down.

Q. Can you give us an idea, Mr. Beckett, how long it was from the time that Cunningham called you to go down and eat this lunch until you saw him in that condition; can you give us any idea about what length of time it was?

A. Well, no, I couldn't very well. It wasn't very long. It seemed very short. I saw him in that condition before any of the people come.

Q. You can't say how long you had been at the organ again before he appeared and sat down by you and complained of this stiffness?

A. Well, it was a very short time. I couldn't give the number of minutes, but it was very short.

Q. I will ask you to state whether Cunningham before this had been about the church doing his ordinary duties, apparently well?

A. You mean other days?

Q. No; I mean on that day.

A. Well, I didn't see him when I was there at two o'clock. He may have been. The church was open and most likely he was there.

Q. Were you in the habit of going there on Saturday afternoon?

128 A. No; I generally went in the morning. It was very seldom that I went on a Saturday afternoon.

Q. It was a little out of the usual order of business for you to be there in the afternoon?

A. Yes; we had a standing engagement to go out, to all go to the park Saturday afternoons, we choir boys; and this Saturday, for some reason, I don't know why, we went in the morning.

Q. And that was a departure from your usual custom to be there that afternoon?

A. Yes, sir.

Mr. EARLY. I object to the admission of the last answer, and ask that it be stricken out as irrelevant and incompetent whether or not it was his custom to be there at any particular hour.

(Objection overruled; to which ruling of the court defendant then and there duly excepted.)

Q. I believe you stated that you were not acquainted with the defendant at all; didn't know him?

A. I didn't know him at all personally.

Q. Had you ever seen him before?

A. Well, I may have seen him, but I didn't know him.

Q. Mr. Beckett, I will ask you to look at this envelope and its contents and state whether you ever saw them before (handing witness envelope and letter).

A. Yes; this letter I got.

(Said envelope and letter were marked, respectively, Exhibits "B" and "C.")

Q. How did you receive these papers that I have showed you, marked Exhibits "B" and "C?"

A. I got them through the mail.

Q. Through the mail in the ordinary course of business?

A. Yes.

Q. Where was this delivered to you?

A. I think it was delivered at the church. Most of my mail went to the church.

129 Q. I will ask you to state, Mr. Beckett, whether you were at that time choir master of the church?

A. Yes, sir.

Q. What sort of a choir was it you led there?

A. Boys and men.

Q. Was this the only paper of this kind that you received there?

A. Yes; I think so. I don't remember any others.

Q. Where was this paper at the time of this affair, Mr. Beckett?

A. I had it in my room.

Q. And what did you do with it afterwards?

A. I gave it to one of the detectives.

Q. To one of the police officers?

A. Yes, sir.

Q. Do you remember when you gave it to him?

A. Monday morning.

Q. The Monday after this occurrance?

A. Yes, sir.

Q. And with the exception of these marks that have since been put on it, it is exactly the same as it was then?

A. Just the same as it was then.

Q. Can you state, Mr. Beckett, whether you received a letter about the date of the postmark upon the envelope?

A. I don't understand.

Q. Do you remember whether or not you received this paper at or about the time of the date of the postmark on the envelope?

A. I didn't notice the postmark at all.

Q. Was the envelope sealed at the time?

A. Yes, sir.

Q. How long were you laid up with this sickness, Mr. Beckett?

A. I was out of the hospital Monday morning.

Q. You were able to attend the inquest on that day?

130 A. Yes.

Q. You were not at the church on Sunday?

A. No.

Q. If I recollect aright, you stated that when you went to the church about four o'clock you went in on the Lindell avenue side?

A. Well, I went up the front steps from Lindell avenue and then went from there to the side.

Mr. BISHOP. I don't exactly understand yet.

Q. (By the COURT.) You mean the front steps of the terrace?

A. Yes, of the terrace, and then turned to the left.

Q. (By Mr. BISHOP.) You say there is a terrace alongside of the steps?

A. In front of the church.

Q. Is that on the Spring avenue side?

A. On the opposite side.

Q. On the opposite side from Spring avenue?

A. Yes.

Q. Now, when you came up the steps to the terrace and went around the church to the opposite side, where was it you saw Cunningham?

A. He was on the front lawn.

Q. Is there much of a lawn there?

A. On the Lindell avenue side there is the whole corner.

Q. And he was engaged in sprinkling that lawn, you say, at that time?

A. Yes.

Q. You had no conversation with him then that you remember of?

A. Yes; he said he had a lunch.

Q. That was the first time he spoke of the lunch?

A. Yes; he said he had a lunch and asked if I would help him to eat it.

Q. Did you say you would?

A. Yes. I was some distance from him. I stopped for a

131 moment and said I would, as soon as he was ready, or something to that effect.

Q. Then you went on in to the organ and came when he called you from the organ?

A. He told me then he would soon be through and I could go and practice until he was ready.

Q. You saw no one else there at that time?

A. No.

Q. How long were you at the church the first time?

A. I wasn't there but a very short time; wasn't there but three or four minutes; just went in the church and right away.

Q. There were none of the choir boys about there then?

A. No.

Q. As far as you knew, there was nobody in the church at the time except yourself and Cunningham, at the time you were eating this lunch?

A. As far as I know, there was nobody.

Q. Where was this basket of lunch when you last saw it?

A. Down in the cellar.

Q. Is that part of the cellar under the choir gallery?

A. Yes; there is a place fixed up there with a small furnace and a concrete floor, and is used by the choir boys as a sort of an eating place.

Q. Was the bottle that you saw there at that time anything like that, Mr. Beckett [showing witness beer bottle]?

A. Yes; same kind of a bottle.

Q. I will ask you to state, Mr. Beckett, whether or not you saw any dishes similar to this when you tackled that lunch [exhibiting glass dish containing crackers and cheese, with cover]?

A. Yes; some cheese and crackers were in that dish, and the glass cover over it just like that.

Q. What did you do with the charlotte russe package at the time you ate the contents?

A. Why, I think I threw it in the furnace.

132 Q. Was there more than one charlotte rus'e, *of* just one?

A. No; only one.

Q. Was it like that [showing witness charlotte russe wrapper]?

A. Yes; just like it.

The court here duly cautioned the jury and adjourned until 10 a. m. to-morrow morning.

TUESDAY, *May 26, 1896.*

Court met pursuant to adjournment; present as on yesterday. Further proceedings in the case at bar were has as follows:

F. S. BECKETT.

Direct examination continued by Mr. BISHOP, as follows:

Q. Mr. Beckett, you stated on yesterday in your examination that when you started to eat this lunch you discovered a bitter taste. Can you state, Mr. Beckett, what part of the lunch it was that tasted bitter?

A. The cheese.

Q. Are you sure of that?

A. Yes, sir.

Q. Can you give us any more particular description of the taste that you have already given?

A. Well, it was simply a bitter taste that I couldn't get out of my mouth after I had eaten it.

Q. Had you ever tasted anything like it before, do you recollect?

(Objected to as immaterial and irrelevant.)

(Objection sustained.)

Mr. BISHOP. I am trying, if possible, your honor, to arrive at the taste of this cheese that he took. I asked him whether he remembered ever tasting anything like it before, or if it had any similarity to anything else.

The COURT. You might ask him whether or not it had a peculiar taste, or whether he recognized it as similar to anything he ever tasted before.

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Mr. BISHOP. I think that is substantially the same question, your honor.

Q. Was the taste similar to anything you had ever tasted before?

A. It tasted something like quinine.

Q. Can you state, Mr. Beckett, how many mouthfuls of it you took before you tasted it?

A. Why, I tasted the first mouthful.

Q. A very small amount?

A. Yes.

Q. I don't remember distinctly whether you stated on yesterday you ate the cheese first or drank the beer first?

A. Drank the beer first.

Q. Nothing the matter with the beer, was there?

A. No; I didn't notice anything at all.

Q. And the charlotte russe—was there anything peculiar about that?

A. No; that was all right.

Q. And the fruit was all right?

A. Yes.

Q. I will ask you to state the manner in which Cunningham ate the lunch and about what quantity he ate of the cheese, Mr. Beckett?

A. Why, he ate principally the crackers and cheese, and I didn't see him eating the fruit at all.

Q. You say there was but one box of charlotte russe, so far as you know?

A. Yes; and I ate that myself.

Q. I will ask you to state, Mr. Beckett, if you know whether, as a matter of fact, Cunningham had a short time before this brought any mushrooms to the city?

A. What is that?

Q. Do you know of your own knowledge whether Cunningham had brought to the city some mushrooms a short time before that?

134 A. Yes; he did.

(Objected to as incompetent and irrelevant. Objection overruled; to which ruling of the court defendant then and there duly excepted.)

Q. Did you see them?

A. Yes, sir.

Q. Now, in regard to your symptoms, Mr. Beckett, after you were taken sick, I will ask you to state whether you had any pains in the bowels, any griping pains?

A. No; I didn't have any in the bowels at all.

Q. Or any diarrhœa?

A. No; no diarrhœa.

Q. Were there any other symptoms than those you described yesterday, of a dizziness in the head and a loss of control of your limbs?

A. Then I had convulsions—cramps; that's all.

Q. I will ask you to state whether they were or were not under your control?

A. They were not under my control at all.

Q. I will ask you if there was anything peculiar about these convulsions; and, if so, give their general nature as well as you can describe them.

A. Well, they were very painful and the muscles would contract.

Q. Can you illustrate in any way the movements of your limbs?

A. Well, I don't know, further than whatever position I happened to be in my muscles would contract and I'd stay in that same position.

Q. Well, can you illustrate with your arm or with your leg any peculiar effect they had?

A. Well, if I happened to be in this position (indicating) I'd stay this way; whatever position I was in why I would stay in that position, and then the muscles of the back would contract and my head would go back.

135 Q. How long did these convulsions last; at what time was it you got rid of them entirely?

A. Why, I had them until that night when I was asleep; I'd wake up with them, but they kept getting weaker all the time.

Q. I will ask you to state whether or not you were at all sensitive to touch?

A. Yes; if anyone touched me, it seemed as if they hit me very hard.

Q. What was the general character of the symptoms now of Cunningham?

A. Well, he said he suffered great agony.

Q. Not as to what he said, but just what you saw with your own eyes, Mr. Beckett, as well as you can give it.

A. His muscles would contract and he had lockjaw; then they would——

Q. (By Mr. EARLY.) Are you stating what he told you or what you saw yourself?

A. Stating what I saw. His jaws would contract—lockjaw—and he couldn't speak. Then they would relax again and he would talk again. And the muscles of his back contracted and he'd draw all up together. His arms and legs would draw up; then his back curved and his head was drawn up. The last I saw of him his feet were on the floor and his shoulders on the chair, and he was perfectly rigid. His hands would contract.

By Mr. BISHOP:

Q. What sort of a basket was this lunch in, Mr. Beckett?

A. A basket like that [pointing to chip basket].

Cross-examination by Mr. EARLY:

Q. Mr. Beckett, when did you come to the city of St. Louis?

A. The latter part—the latter end of March, 1894.

Q. What did you do when you came here?

A. What business, do you mean?

Q. Yes, sir.

A. I took the position as organist of St. Peter's Church.

Q. Did you come here for the purpose of assuming that position?

136 A. Yes, sir.

Q. At the time, what duration of contract, if any contract at all, did you make, Mr. Beckett, with the vestrymen of the church for your services there when you came?

(Objected to as immaterial. Objection sustained; to which ruling of the court defendant then and there duly excepted.)

Q. Were you there as organist continuously from the time that you came up to the time of this alleged poisoning?

A. Yes, sir.

Q. Now, at the time of this poisoning, had your contract lapsed with the vestrymen an organist of that church?

(Objected to as immaterial and incompetent. Objection overruled.)

A. No; it hadn't lapsed.

Q. Do you remember how long it would be until that contract would lapse at that time?

(Objected to as immaterial.)

The COURT. The only way in which I see this is material, and the reason why I permitted the question to be answered, is this: On yesterday the State undertook to show that he was not accustomed to going there on Saturday, and that defendant possibly knew what his custom was.

Mr. BISHOP. I think your honor is mistaken about that. He stated he was in the habit of going there on Saturday morning, and it was an unusual thing for him to be there on Saturday afternoon.

The COURT. That is what I am referring to, and if he can show that at that time he was still in the employ of the church he may do so. I do not think it is material to show what time his employment would cease afterwards. Objection as to when the contract would terminate is sustained.

(To which ruling of the court defendant then and there excepted.)

Q. Did you make a contract, Mr. Beckett, when you came
137 to that church for your services as organist?

(Objected to.)

The COURT. Sustained, the ruling based upon the reason stated before. The only material question, I say, is whether or not at the time of this occurrence he was in the employ of the church.

(To which ruling of the court defendant then and there duly excepted.)

Q. How long after this occurrance, Mr. Beckett, did you remain as organist of the church?

A. The next day.

Q. What was the reason, Mr. Beckett, that you didn't continue as organist of the church any longer?

(Objected to as immaterial. Objection sustained; to which ruling of the court defendant then and there duly excepted.)

Q. Now, I believe in your direct examination you supposedly identified a certain anonymous letter which you claim to have received. Now, I will ask you to state, Mr. Beckett, if you read that letter.

A. The anonymous letter?

Q. Yes.

A. Yes.

Q. I will ask you to state if that letter didn't apprise you of the true state of feeling of the vestrymen of that church in regard to your services as organist.

A. No; I didn't learn anything at all from that.

Q. Now, Mr. Beckett, you said that you came there about two o'clock on the day of this alleged poisoning. Now, at the time you came there, about two o'clock, what did you come there for at that time?

A. Why, I went there to get a photograph?

Q. Were you in the habit of keeping photographs at the church?

A. I had about a dozen of them there.

138 Q. What did you want with it at that time?

A. I promised to give one to one of the members of the church.

Q. Now, how long did you remain, Mr. Beckett, at this time?

A. In the church at two o'clock?

Q. Yes.

A. Oh, I remained there long enough to get the photograph; whether I did anything else I don't remember.

Q. Why do you think it was at two o'clock when you called there, Mr. Beckett?

A. Because I was at lunch at about a quarter of one, and I am judging from the time I generally took to eat lunch and the time it took to walk over to the church.

Q. And comparing that, or as well as you can estimate the time, you think, then, that it was near two o'clock?

A. About two o'clock.

Q. Now, how long did you remain there at that time?

A. A very short time.

Q. Well, about how many minutes, Mr. Beckett, do you think you remained?

A. Why, I don't think I was there any longer than five minutes, anyway.

Q. Now, at the time you called there at two o'clock did you see anyone around there?

A. No; I don't remember seeing anyone.

Q. Do you remember whether or not the church was open?

A. The church was open; yes.

Q. I will ask you if you didn't testify at the coroner's inquest that you did see the janitor out on the lawn at the time you first called?

A. I saw him there the second time.

Q. Well, the question is I am asking you now, Mr. Beckett, if you didn't testify at the coroner's inquest that you saw him the first time you called.

A. If I did testify that, that must have been right.

139 Q. Then when you testified here yesterday that you didn't see anybody you think you may have been mistaken?

A. To the best of my knowledge now, I was mistaken when I said I did not see him.

Q. Now, where did you go to, Mr. Beckett, when you left that church?

A. I made some calls around the vicinity of Cook avenue.

Q. Where did you go? Just name one of the places.

A. Well, I made several calls; about, I think, three calls. The names I can't recall now.

Q. I will ask you if you went as far west as 43d street, Mr. Beckett?

A. Yes, sir.

Q. Who did you go to see there?

A. Not quite. I went to between 42d and 43d.

Q. Do you remember of anyone upon whom you called?

A. Yes.

Q. Who was it?

A. Well, if it is necessary to say, why, I can say, but I wouldn't care to bring the name into prominence.

Mr. BISHOP. I do not see the relevancy of that, your honor, unless it is material in this case and the defense can show it is material that the gentleman should give the name of every person he called on.

Mr. EARLY. I am not asking that, your honor. I am merely trying to show the jury where the witness was during this absence from the first visit to the church until the second time that he called at the church.

The COURT. I think he may answer that. It may be material to show possibly what his condition was or something just before this alleged poisoning.

Mr. BISHOP. Well, if it is material to this case, I suppose it is all right.

The COURT. I can't tell whether it is material or not.

WITNESS. Well, I left the photograph at the residence of Mr. Compton.

140 Q. And then where did you go?

A. And then I went in the vicinity of Cook avenue.

Q. Where did you go there?

A. Well, I have forgotten the names of the places.

Q. And did you then call at another place?

A. I don't remember, but I think it was two places. I was in the habit of making two or three calls each afternoon, but they were business calls and I have forgotten now the places or the names.

Q. Do you fail to remember now any of the places at which you called other than the ones you have mentioned?

A. I don't remember the other places at all.

Q. Now, what way did you travel upon your return, Mr. Beckett, to St. Peter's church; what streets did you come back on?

A. I don't remember that, either.

Q. Do you remember whether or not you started directly back from Cook avenue towards the church?

A. Well, I don't remember positive about that.

Q. Now, about how long were you gone on this trip?

A. Oh, I should think about, as near as I can judge, about a couple of hours.

Q. Do you think that it might have been less than a couple of hours?

A. Well, a trip of that kind would take about a couple of hours.

Q. Do you remember of stating at the coroner's inquest that you were gone about an hour and a half?

A. No; I don't remember.

Q. Don't remember at all?

A. Don't remember the time; no.

Q. Did you keep any account of the exact time you were gone—that is, did you look at your watch when you left, or are you able to tell definitely the time that you were actually gone?

A. No; I didn't keep any time at all, when I left or when I returned.

Q. Now, at the time you came back, Mr. Beckett, was the

141 first time, then, that you knew anything about the presence of any lunch at the church. Is that correct?

A. The first time?

Q. Yes; when you came back from your trip.

A. The second time was.

Q. I mean the second time.
A. Yes, sir; that was the first I had heard.
Q. That was the first you knew about it?
A. Yes.
Q. The' what did you do?
A. I went in and practiced on the organ.
A. And then he came shortly and called you down to lunch?
A. Yes.
Q. Now, was that bottle of beer opened in your presence?
A. No; it was opened in another part of the cellar.
Q. And did you drink the beer first?
A. Yes.
Q. Were you able to distinguish anything wrong with the taste of the beer?
A. No; didn't notice anything in that at all.
Q. Now, in your direct examination you stated that there was no suspicious taste to any of the articles contained in the lunch save the cheese. I will ask you to state if you had ever at any previous time eaten any lunch with the deceased at the church?
A. Not outside of fruit that I would buy.
Q. Just answer the question.
A. You mean any lunch of that same kind?
Q. No; I mean any lunch.
A. Well, you may call fruit lunch.
Q. Yes. Do you know anything about whether or not it was the habit of the janitor to carry lunches to the church regularly?
A. I never saw any.
Q. You don't know, then, anything about that?
A. No.
142 Q. Now, in regard to this statement which you claim was made to you, *to* mere remark added to it with the explanation in regard to the mushroom story, concerning which I don't care to go into at this time, the mere remark the lunch was sent by Mrs. McLean's man was all that was said?
Mr. BISHOP. I object to that because no such remark has been made or testified to. He didn't state that this lunch was sent by Mrs. McLean's man at all.
Mr. EARLY. Well, I withdraw it.
Q. Well, then, I will ask you if the statement that the lunch was brought by Mrs. McLean's man was all that was said to you in regard to that particular fact, or statement, or matter?
A. Why, he told *my* why Mrs. McLean sent it; not only told me that Mrs. McLean had sent it, but told me why Mrs. McLean had sent it.
Mr. EARLY. The answer is not responsive to the question, but I think I shall not ask that it be stricken out.
Q. Now, I will ask you the question if this statement that the lunch was brought by Mrs. McLean's man, saying nothing now of the reasons, as you say, the explanations which you gave, I will ask you if the bare statement that the lunch was brought by Mrs. McLean's man is a true statement and a correct statement of the exact language of the deceased?
A. Well, it was to that effect.

Q. Was there anything said about who was meant by Mrs. McLean, any initials mentioned?

A. Well, I knew who he meant, because this same lady was always spoken of as Mrs. McLean, and we had occasion to speak of her frequently.

Q. You had spoken of her before, had you?

A. I had spoken of both Mr. and Mrs. McLean.

Q. You had spoken of Mrs. McLean before, had you?

A. Yes.

Q. Wasn't it a fact, Mr. Beckett, and isn't it a fact now, that
143 you knew yourself all about the mushroom matter all the time, and that you actually ate these mushrooms yourself?

A. Yes; I ate part of them.

Q. And at this time did you know this defendant at all; I mean of your own knowledge did you know him at all?

A. Not personally.

Q. Now, Mr. Beckett, how long did you remain in that basement after you had eaten this lunch?

A. I didn't remain any time. I was eating half of the pear as I was going up.

Q. And didn't you also state that you ate some of the cheese?

A. Yes.

Q. Now, what did you do with the bitter cheese that you tasted?

A. I threw it away.

Q. Do you remember whether or not you threw it in the furnace?

A. I threw some of it; I think I threw it all.

Q. Did you also eat the charlotte russe?

A. Yes.

Q. Do you remember what you did with the wrapper?

A. I threw that away, but I don't remember where I threw it.

Q. Now, the next time that you saw this deceased was when he came to you, following you into the choir room; is that a fact?

A. No; he followed me to the organ. It is on the other side of the church from the choir room.

Q. Now, Mr. Beckett, what were the first symptoms which you experienced of anything wrong as to your condition?

A. Why, stiffness in the legs.

Q. Then, Mr. Beckett, what did you next feel?

A. I felt a slight dizziness and stiffness in the legs; seemed to come together, as far as I can remember.

Q. How long after that was it before you had any convulsions?

A. That was after I had gone to the office; small office.

Q. Then you had convulsions?

A. Yes.

144 Q. Now, Mr. Beckett, about how many convulsions did you have at the first attack—the first time that you felt the presence of convulsions—now, how many convulsions, or do you remember how many convulsions at that time you had?

A. Well, I had *them* more or less severe into that night.

Q. Did you after the first attack experience any relapse in regard to the convulsive state of your system?

A. Yes; I'd have a convulsion and then it would relax.

Q. Then after that did the convulsions come on with renewed vigor?

A. Well, the first were about the same. They were with renewed vigor, if anything.

Q. During the time you experienced these convulsions did you' mind remain perfectly clear?

A. Yes, sir.

Q. Did you experience any griping or excruciating pains in the stomach and bowels?

A. No; I didn't at all.

Q. Now, from there you were removed after to the Marion-Sims Hospital?

A. Yes.

Q. And you were able, were you, to be present at the coroner's inquest?

A. Yes.

Q. At the second time you called at this church did you see anyone there save the janitor and yourself?

A. Not until we had eaten the lunch.

Q. Well, I mean at the time you first called did you see anyone else there?

A. No; he was the only one I saw.

Q. You saw no one bring any lunch there?

A. No one at all.

Q. By what means, Mr. Beckett, are you able to identify the letter which you have referred to?

A. The anonymous letter?

145 Q. Yes; the anonymous letter?

A. Why, the handwriting.

Q. At the time you received that letter, Mr. Beckett, did you make any special study of the handwriting?

A. Yes.

Q. And then you left it lying in your room until after this affair?

A. Yes.

Q. Where are you now engaged, Mr. Beckett?

A. At the Church of St. Paul the Apostle.

Q. And when were you engaged there?

A. The 1st of January.

Q. What were you doing, Mr. Beckett, from the time of this alleged accident until the 1st of January last?

Q. (By Mr. BISHOP to Mr. Early.) 1st of January last?

Q. (By Mr. EARLY.) Was it last January you referred to?

A. A year ago last January.

Q. Well, what were you doing in the meantime, between September and January?

A. I played at different churches.

Q. Played at odd jobs, did you?

A. Different churches; yes.

Q. Now, Mr. Beckett, is that all you knew about this case?

A. Well, it's all I can think of now, unless I am reminded of something else; that is all I can think of at present.

Redirect examination by Mr. BISHOP:

Q. You say you came here to St. Louis expressly to take charge of the organ at St. Peter's?

A. Yes, sir.

Q. And you were there continuously from your arrival until the Sunday succeeding this poisoning?

A. Yes.

Q. Was the congregation worshiping at Spring and Lindell avenue when you came here?

146 A. Yes, sir.

Q. About what time did you come?

A. Well, I was here in time to conduct the first service in April. I think it was the latter end of March I come, or about the 1st of April.

Q. Now, you say on this Saturday you had taken lunch at home?

A. Yes.

Q. About a quarter past one, was it, or two; when was it?

A. Well, the proper time was half past twelve, but I was late. I had been out to the park and I was late.

Q. You had been to the park with the choir boys, I believe I understood you to say yesterday?

A. Yes; I was late that day.

Q. Where were you living at that time?

A. 3418 Lucas avenue.

Q. That was about how far from the church, just about?

A. Oh, five or six blocks.

Q. You stated, I believe, that you went to the church at two o'clock expressly to get a photograph?

A. Yes.

Q. Was it your own photograph?

A. No.

Q. Well, then, you took this photograph to this residence on Cook avenue and left it there?

A. Yes.

Q. And then you called at two or three other places in the neighborhood on business?

A. Yes.

Q. What was the nature of your business?

A. Simply to call on the mothers of different boys to tell them to be there that night—to be at rehearsal that night.

Q. Were you to have a rehearsal at the church that night?

A. I was to have one; yes.

Q. For the service the next day?

A. Yes; they were new boys that I wanted for the next day.

147 Q. This, you say, altogether took in the neighborhood of two hours before you got back to the church, and you think it was about four when you got back?

A. Yes.

Q. And you went straight to the organ?

A. Yes.

Q. Now, you say you had spoken several times, or at least had spoken before to Cunningham about Mr. and Mrs. McLean?

A. Yes.

Q. Were you well acquainted with them?

A. Yes; I knew them very well.

Q. As members of that church?

A. Mr. McLean was treasurer of the church and Mrs. McLean was a prominent lady there, and I met them both.

Q. Of course you had occasion to see Mr. McLean once in a while?

A. Once in a while; yes.

Q. Was there any other family by the name of McLean that you knew of connected with the church?

A. No; they were the only ones.

Q. How near did they live to the church?

A. About a block; block and a half.

Q. Had there been any other Mrs. McLean ever spoken of between you and Cunningham?

A. Not that I remember of.

Q. Was there any difference in the mentioning of Mrs. McLean's name on that day from any previous time?

(Objected to as incompetent and irrelevant. Objection overruled; to which ruling of the court defendant then and there duly excepted.)

(Question read.)

A. No; he always spoke of her as Mrs. McLean.

Q. Just in that way?

A. Yes.

Q. Do you remember whether he had ever made any allusion
148 to you before about Mrs. McLean's man?

A. Yes; he told me before about the man being janitor at one time of the church, of the old church; also told me the man used to come over there and borrow things; had spoken of him several times.

Q. Was there any different allusion on this occasion to Mrs. McLean's man from what there had been made before—did he seem to indicate any other person?

A. No; not that I can remember.

Q. I will ask you to state, Mr. Beckett, whether you yourself on that day brought any food or anything in the shape of a lunch to the church?

A. No.

Q. I believe you stated that you never had seen Cunningham at any time bring a lunch to the church?

A. No.

Recross-examination by Mr. EARLY:

Q. Mr. Beckett, I will ask you, sir, if you didn't swear at the coroner's inquest that you didn't know who Mrs. McLean's man was?

A. I didn't know the man personally.

Q. Well, sir, I will ask you if you didn't swear to that?

A. That I knew the man?

Q. That you didn't know him?

A. I knew simply that he was Mrs. McLean's man. I didn't know the man at all.

Q. Well, sir, didn't you swear that you didn't know who Mrs. McLean's man was?

A. I wouldn't recognize him; no.

Q. Didn't you swear to that?
A. I wouldn't know Mrs. McLean's man.
Q. You don't know how many sextons were previously at that church?
A. No.
Q. You don't know whether Mrs. McLean had one or a dozen
149 men employed, do you?
A. I never heard of but one.
Q. Well, you don't know, do you?
A. I never heard of but one man she had.
Q. Well, do you know whether she had more than one or not?
A. She may have had a dozen for all I know; I never heard of more than one.
Q. Well, I mean you don't know of her having but one, do you?
A. I never heard of but one.

* * * * * * *

234 MICHAEL O'MALLEY, being duly sworn on behalf of the State, testified as follows:

Direct examination by Mr. BISHOP:

Q. Please state your name.
A. Michael O'Malley.
Q. What is your occupation, Mr. O'Malley?
A. Captain of police.
Q. How long have you been connected with the police force of this city?
A. Very near twenty-one years.
Q. In September and October, 1894, where were you stationed?
A. I was stationed at the 5th district.
Q. Were you then captain?
235 A. Yes, sir; I was captain.
Q. Where was the station?
A. It was 2827 Market street. I think that was the number of the station.
Q. Do you remember the time of the alleged poisoning of Joseph Cunningham at St. Peter's Church?
A. Yes, sir.
Q. Did you see the defendant Thompson at or about that time?
A. Yes, sir.
Q. When did you first see him, captain?
A. He was brought into the office on the night of the 29th, I think.
Q. That was on Saturday night, the night of the poisoning?
A Saturday night; yes, sir.
Q. Do you remember about what time it was, or have you any recollection of that?
A. I think probably it was, maybe, between—well, it was between seven and nine o'clock, I think.
Q. It was after supper?
A. After supper; yes, sir.
Q. Did you have any conversation with the defendant?
A. Yes, sir; I had quite a conversation with him.

Q. Did you ask him whether or not he had been at the church that day?

A. Yes, sir.

Q. What did he say?

A. He denied being at the church that day, I think.

Q. Did he say anything about his having been anywhere near it?

A. He said he went around the church on the sidewalk, to the best of my recollection, and saw Mr. Cunningham and nodded his head to him.

Q. Did he tell you what Cunningham was doing at the time?

A. He was sprinkling the lawn, I think.

236 Q. Did he make that statement to you when you first asked him the question?

A. No; I think he denied that first, but afterwards admitted it. I wouldn't be positive about that.

Q. Do you remember whether he said what time it was he saw Cunningham as he passed the church?

A. I think probably it was about four o'clock in the afternoon.

Q. I will ask you to state, Captain, whether the defendant while he was in custody wrote any letters?

A. Yes, sir.

Q. Did you see him write them?

A. I saw him write them; yes.

Q. It was done in your presence, then, was it?

A. Done in my presence; yes, sir.

Q. I will ask you to look at these papers which I now hand you, Captain; examine them carefully, and state whether or not they were written by the defendant in your presence, if you saw him write them [handing a number of letters to witness.]

A. Yes, sir; those are the letters that he wrote.

Q. All written in your presence?

A. Yes, sir.

Q. By him?

A. While he was locked up I asked him if he wanted to write to anybody. He said yes, he'd like to correspond with Rev. Dr. Short and with his wife, and I gave him paper and pencil and he sat down and wrote those two letters.

Q. Where were they written?

A. They were written in the calaboose. This letter he wrote to Mr. Beckett the following day, while he was at the Marion-Sims Hospital.

(Said letters were marked Exhibits "G," "I," and "F," respectively.)

Q. Was this envelope also addressed by him [showing witness envelope]?

237 A. Yes, sir.

(Said envelope marked Exhibit "H").

Q. Now I will ask you about this other paper. You say that was written on the next day (Exhibit "F")?

A. The next morning; yes.

Q. Where was this written?

A. It was written out there in the office.

Q. In your office?

A. No; out in the main office.

Q. Did you see him write this also?
A. Yes, sir.
Q. With pen and ink?
A. Pen and ink.
Q. Also this envelope he addressed?
A. Yes, sir; that's the envelope.
(Said envelope was marked "Exhibit E").
Q. Captain, I will ask you whether you had any conversation with the defendant in regard to mushrooms?
A. Yes, sir.
Q. State what it was, as near as you can recollect.
A. He denied all knowledge of seeing any mushrooms. I asked him if he wasn't present in Mrs. McLean's kitchen, where a colored woman named Sarah Ditto was ironing, when Cunningham brought in the basket of mushrooms, and Cunningham even took the paper off the mushrooms, I understand, and showed them to Thompson and to Sarah Ditto. I asked Thompson if he didn't see those mushrooms there, and he denied it; said he didn't see any mushrooms, didn't know the basket contained.
Q. He didn't know what the basket contained?
A. He didn't know what was in the basket.
Q. Did he also say he didn't know what mushrooms were?
A. Yes; I believe he did.

* * * * * * *

263 JOSEPH GOCKING, being duly sworn on behalf of the State, testified as follows:

Direct examination by Mr. BISHOP.

Q. Please state your name.
A. Joseph Gocking.
Q. You are a member of the police force of this city?
A. Yes, sir.
Q. And you were on the force in September, 1894?
A. Yes, sir.
Q. As a special officer?
A. Yes, sir.
Q. What district were you in at that time, Mr. Gocking?
264 A. In the 5th.
Q. That was Captain O'Malley's district?
A. Yes, sir.
Q. Did you get information in regard to a poisoning at St. Peter's Church on that day?
A. Yes.
Q. About what time did you first get the information?
A. I guess it was about six o'clock in the evening.
Q. Where did you first go?
A. Where I got the information?
Q. No; where did you first go after you got the information, or were you detailed by your captain?
A. Well, when I went to the office after supper——

Q. No; I just asked you whether you were detailed by the captain on this case. Were you detailed by the captain on this case?

A. Yes, sir.

Q. At the time you received the information?

A. Yes, sir.

Q. Now, where did you first go?

A. Well, I got the information at the office when I came there after supper that there was a poisoning case out there, and I went out to the church, and when I got there Captain O'Malley had got there ahead of me. He was there standing talking to Dr. Love, I think.

Q. Had the body of Cunningham then been removed from the church?

A. Yes, sir.

Q. Now, where did you go from there?

A. From the church I went over to Mrs. McLean's on Pine street—West Pine street.

Q. Where did you go from there?

A. I went to 3718, *I* think it is, Morgan street.

Q. About what time did you get there?

A. Morgan street?

265 Q. Yes; about?

A. About eight o'clock, I guess; between eight and nine o'clock.

Q. Is that where the defendant lived?

A. Yes, sir.

Q. Did you find him there?

A. Yes, sir.

Q. Did you take him into custody?

A. Yes, sir; that is, myself and my partner, Harrington.

Q. What did you do with him after you took him in custody there?

A. Brought him down to the 5th district station.

Q. Where was that at that time?

A. 29th and Market; that is, in the middle of the block between 28th and 9th on Market.

Q. Did you notify the defendant at the time you arrested him what you arrested him for?

A. No, sir; I think not. I think I told him the captain wanted to see him.

Q. Well, how did you get over to the 5th district station?

A. I didn't understand you.

Q. How did you get over to the station, ride or walk?

A. No, sir; we walked over.

Q. You and Harrington were together at the time?

A. Yes, sir.

Q. Did the defendant make any statement to you in regard to the matter at all before you got to the station?

A. No, sir; only on our way to the station, when we got up near Grand avenue on Morgan he stopped suddenly and he wanted to know whether we had a warrant for him. He was walking in between the two of us, and we told him we didn't require any warrant; and I got a hold of him then and started off.

Q. Up to that time nothing had been said by either of you what he was wanted for?

266 A. No, sir; I think not.

Q. Now, when you got to the station did you have any conversation with him?

A. Well, I didn't myself; no, sir. The captain had a conversation with him.

Q. Now, I will ask you to state as near as possible what the conversation was; what the captain said in your hearing, and what the defendant said; and what, if anything, to him, and what he said in reply.

A. Well, I couldn't say that, Mr. Bishop. I did hear him say, though, that he wanted to write a letter to Mr. Short and one to his wife.

Q. I will ask you to state whether anything was said by the defendant there about any beer or cheese.

A. Yes, sir.

Q. Now, just state what——

Mr. EARLY. Just wait.

Q. Was that said in the presence of Captain O'Malley?

A. Yes, sir; I think it was in Captain O'Malley's office where Thompson was.

Q. (By Mr. BISHOP.) Well, go on and state, Mr. Gocking, all that you remember about that.

A. Well, he first denied buying beer, then afterwards he admitted he did buy beer, and I think he said crackers and cheese, but I am not positive about the crackers and cheese, but I am the beer, and he gave it to some colored man that was going away. He mentioned the name, but I don't remember the name at the present time.

Q. Now, I will ask you to state, Mr. Gocking, whether you found anything at the church.

A. I did that Sunday morning; yes.

Q. What did you find there?

A. I found a piece of paper that they wrap these charlotte russes up in and a piece of charlotte russe.

Q. Is this the paper [handing witness charlotte russe wrapper]?

267 A. Yes, sir; there was a piece of it stuck on there, but I don't see that now.

Q. You say there was a piece of charlotte russe stuck on there?

A. Yes.

Q. Where did you find that?

A. I found it in the furnace in the basement of the church.

Q. I will ask you if you ever saw this paper before [handing witness Exhibit "A"].

A. Yes, sir.

Q. Where did you first see that, Mr. Gocking?

A. Where did I first see it?

Q. Yes?

A. In Mr. Ruckersfeldt's drug store, on Spring and Laclede avenue.

Q. Do you remember what day you saw it there?

A. I think it was on the 3d or 4th of October.

Q. You got that from Mr. Ruckersfeldt, the druggist?

A. Yes, sir.

Q. I will ask you to state, Mr. Gocking, if you ever saw this garment before [showing witness jumper].

A. Yes, sir.

Q. Where did you see that?

A. In Mr. Short's basement, out on West Pine street, near Spring avenue.

Q. That is the clergyman, Dr. Short?

A. Yes, sir; Rev. Dr. Short.

Q. How did you happen to go there to this basement, do you remember?

A. Mr. Short told me that George's hat and jacket was out at his house, in the basement, and he wanted me to get them away from there—the hat and jacket that he had been wearing.

Q. Did the defendant say anything about them, do you remember?

A. Not as I remember; no, sir.

268 Q. Did you find this hat here also [showing witness straw hat]?

A. With the shirt; yes.

Q. I mean the same place where you found the jacket?

A. Same place; yes, sir.

Q. Do you know anything about this dish, Mr. Gocking [exhibiting dish]?

A. I do.

Q. Where did you get that?

A. 3718 Morgan street.

Q. The same place where you found the defendant?

A. Yes, sir.

Q. Mr. Gocking, did you see the papers that were written by the defendant in the station out there?

A. Yes, sir.

Q. Did you mark them in any way?

A. I think I did. I am not positive about that. I think I did. I can tell when I see them.

Q. I will ask you to look at these papers and state whether or not you remember ever seeing them before [handing to witness Exhibits "E," "F," "G," "H," and "I"].

A. Yes, sir; I saw all of them.

Q. Where did you see them?

A. At the station house, 5th district.

Q. Did you see them written?

A. Yes, sir.

Q. By whom were they written?

A. Mr. Thompsin there.

Cross-examination by Mr. EARLY:

Q. Now, Mr. Gocking, I believe you stated that you could identify the articles here which you obtained—the straw hat and jumper and the dish. I believe that is all that you pretend to identify as having been obtained by yourself, is it?

A. Yes, sir.

Mr. BISHOP. And this charlotte russe?

269 Mr. EARLY. Charlotte russe; yes.

Q. Now, these identifications which you pretend to make, Mr. Gocking, are identifications, are they, in a general way?

A. About what?

Q. These matters here. You know—the hat, the dish, and the jumper. I mean you identify them, do you, in a general way as the same ones that you obtained?

A. Yes, sir; I have had them in my possession ever since.

Q. Have they been out of your possession with the circuit attorney?

A. Well, only just the same as Mr. Bishop has them now. Since this trial started I turned them over to him.

Q. You took them home with you?

A. I didn't understand you, Mr. Early.

Q. I say you took them home with you?

A. Took them hom'? No, sir; I did not.

Q. Where did you leave them?

A. I locked them up downstairs here.

Q. And in a general way, then, by that means you are able to identify these that are produced here in court as being the same?

A. The same articles that I recovered; yes.

Q. And in the same manner you identify the writings referred to?

A. Well, I have got a mark on them.

Q. Do you identify them by the handwriting or by the marks?

A. By the handwriting and by the marks also.

Q. Are you able to identify the writings without the marks?

A. Yes, sir.

Q. Positively, are you?

A. Yes, sir.

Q. By the knowledge which you obtained of the defendant's handwriting at that time you are enabled to swear positively to his writing, are you?

270 A. I am not no expert on handwriting, of course. I saw him write those letters and I read the letters, and therefore I know they are the same letters that he wrote out at the station house.

Q. If you, then, were to see a sample of the defendant's handwriting you would be able to swear positively whether or not that was his handwriting, would you?

A. Yes; if I looked at it.

Q. Oh, no; I mean if you were to see a sample of a handwriting, would you be able to swear positively whether or not that was in the handwriting of the defendant?

A. No, sir.

Q. Now, as to the defendant saying that he desired to write a letter, you don't know what previous conversation, do you, had taken place between Captain O'Malley and the defendant prior to the time that you heard that remark?

A. No, sir. I'll tell you the reason why. He was there, the doctor was there, and there were a couple of other parties from the church, and they were all in Captain O'Malley's office. I was in and out myself.

Q. And that was the first remark you heard?

A. Yes, sir; that was the night he was arrested.

Q. Then you don't contradict Captain O'Malley when he says he asked the defendant if he wanted to write them?

(Objected to.)

The COURT. The question whether or not there is any contradiction between Captain O'Malley and himself is a matter of conclusion for the triers of the fact.

Q. You were not present all the time, you say?

A. No, sir; I was not. I was running in and out from the main office to his office—general office.

Q. You don't know all the conversation that took place.

A. I do not; no, sir.

* * * * * * *

274 WILLIAM L. FITZGERALD, being duly sworn on behalf of the State, testified as follows:

Direct examination by Mr. BISHOP:

Q. Please state your name in full.

A. William L. Fitzgerald.

Q. Mr. Fitzgerald, you are a native of St. Louis?

A. I am.

Q. You have lived here all your life, I believe?

A. Yes, sir.

Q. You have held a number of official positions in this city?

A. Yes, sir.

Q. What positions have you held, Mr. Fitzgerald?

A. Official positions?

Q. Yes.

A. Well, I was chief deputy city marshal for a long number of years, clerk of the court of criminal correction four years, and a little over sixteen years chief deputy clerk.

Q. For twenty years or more, then, you have held an official clerical position in the city of St. Louis?

A. Yes, sir; thirty.

Q. I will ask you to state, Mr. Fitzgerald, whether you have devoted any attention to the study of handwriting?

A. Yes, sir; I have, during my lifetime.

Q. Have you had, or not, any experience in the comparison of handwriting?

A. I have had; yes, sir.

Q. I will ask you to state, Mr. Fitzgerald, whether or not you have appeared in this court as an expert on the subject of handwriting?

A. I have, quite frequently, in previous years more than recently.

275 Q. You are now practicing law, I believe?

A. Yes, sir.

Q. I will ask you to state whether you have been recognized in courts as an expert on that subject?

A. Yes, sir; to my sorrow, I have.

Q. I will ask you to examine some papers I now have here, Mr. Fitzgerald, which I wish to submit to you, and state whether or not you have

made a careful examination of all of those papers [showing witness papers]?

A. Yes, sir; I have made quite a careful examination of the papers on the table here.

Q. Every one of them?

A. Yes, sir.

Q. I will ask you to state whether or not you have made an examination of them, this careful examination you have spoken of, with special reference to a comparison of the handwriting?

A. Yes, sir; that was my only purpose.

Q. I hand you now paper marked Exhibit "G," paper marked Exhibit "I," paper marked Exhibit "F," paper marked Exhibit "H," paper marked Exhibit "E," paper marked Exhibit "C" and "B," and paper marked Exhibit "A," and state whether or not, in your opinion as such expert, they are all written by one and the same person [handing said papers to witness]?

A. In my opinion, all of the papers just handed to me were written by the same party.

Q. Now, I will just ask you, Mr. Fitzgerald, to go on and explain the reasons on which you bass your conclusion that all of those documents were written by one and the same person?

A. Well, the same characteristics are exhibited in the writing of the different papers. The formation of the letters, the individuality which runs right through the writing, the system of connecting the letters, the shading and the inclination of the letters, similarity of the handwriting, all tend to make me believe that the same party wrote the different papers.

276 Q. Can you specify in detail the individual characteristics and peculiarities to which you have referred?

A. Well, yes; some of them. Of course, I didn't make any special memorandum. I can remember some of them, yes. In the first place, there is a very peculiar "h." It seems to run through nearly every formation of that letter, and the same characteristics attend that uniformly, I might say. The letter "e," when in the middle of a sentence, the way it is formed and joined with the preceding letter, as well as the letter "g." Well, there is a similarity in all of them. The "r's," and whenever "t" is the final letter there is a uniform way nearly of forming that letter, and the cross and the connection generally between the letters. In a great many instances, nearly in all of the instances where the personal pronoun is attempted to be used, it is written in the italic letter, the small letter. Of course, though, that hardly demonstrates the similarity of the writing. It only goes to confirm the opinion. In spelling the conjunction "and" the "d" is uniformily omitted. That, of course, I say, only confirms the opinion as to the fact that they were written by the same person, independently of the similarity of the letters and their formation and connection. Of course, some are written in pencil and some are written in ink, and, of course, there is always a difference between letters formed by a sharp pen and a pencil. In one of the papers, marked Exhibit "A," I believe, the writing is more labored. It shows more care than in any of the other papers; but still the characteristics, I might say, are stronger, because of the effort that

attended the writing. I didn't make any memorandums. I examined them very carefully, both with my eyes aided by my ordinary glasses, and I used a magnifying glass also to assist me. But, of course, these details I don't pay so much importance to as I do the general context of the writing. There is a great field here to go over, in which, even if there was an attempt, but I don't see any here, to deceive, it could not be very well successfully disguised.

277 Q. Now, referring particularly to that paper which you have, marked Exhibit "A," without reading it, Mr. Fitzgerald, just referring to it as Exhibit "A," will you, in that particular instance, designate the marked features of similarity which indicate it was written by the same man who wrote the others?

A. Well, in the first place, for a matter of comparison, we will commence. In another paper, marked Exhibit "G," the first letter is a capital "D." Well, that capital "D" could hardly be photographed more successfully, it seems to me, than the capital "D" which is the first letter of the abbreviation "Dr." in the Exhibit "A." The letter "e," as I said, being in the middle of a sentence, is formed exactly and connected exactly with the preceding letter, as is the case with all of the other writings. The "y" and the "h," being the same in construction, bear the same peculiarities all the way through. And the "g"—he always connects the "g" with the loop of the preceding letter in a way that is quite peculiar to this writing. The final "t" of this exhibit, "St.," is exactly similar, in my judgment, to the way he writes those words ending in "t" in the other papers. They are not always crossed that way, but as a rule they are; and the way the "S" and the "t" are connected is similar, in fact the connection going all through. Wherever there is a downward curve he always brings up the tail of the first letter in a very peculiar way, so as to make the connection, such as "a" and "d" and "g;" and the loops of such letters as "n" and "i" and "a" and "d" are always, it seems to me, made in the same manner. I see the word "Pine" here. The stem of that "P," as well as the whole construction of the "P," is just exactly the same as is used in the body of one or more of these other letters. He uses the "p" very often, however, as a capital. He uses the italic, or small letter, but makes it large. But in this case he uses the "P" with a curve, as is used once in these other letters. However, as I say, from a general view and as careful an examination as I was able to make, I am free to give my opinion that the same person wrote all of these letters. Of course, I am not governed by these details.

278 Q. I will ask you to take these two envelopes, the one marked Exhibit "E" and the one marked Exhibit "B," and compare them and state what, if any, are the striking resemblances and peculiarities in those two [handing witness said exhibits].

A. Well, it would simply be a repetition of the testimony I gave a while ago. Of course, there are different letters written here, but the way I arrive at the opinion that they are written by the same party is based upon the same reasons that I gave a while ago in connection with the other writings. These details—of course, I don't pay so much attention to bare details, because writers very seldom form the letters the same way. They very often have a little difference; that is, they must have different ways of making a letter. I know I have myself, and writers

generally. For instance, in a "k," sometimes we use the small letter, and other times we use the capital for the small letter. But the earmarks attach to the writing generally.

Q. Now, with reference to this Exhibit "C," in comparison with the exhibit marked "F," do you find the same coincidence and peculiarity, characteristics and individuality, marked there [handing witness Exhibits "C" and "F"]?

A. Yes, sir.

Q. I will ask you, Mr. Fitzgerald, whether, in view of your experience and study and observation of this special subject of handwriting and the examination you have made of these papers, there is any doubt in your mind at all as to whether the same party wrote them all?

A. Well, I wouldn't like to go further in this case than saying I believe the same party wrote them. Of course, I fully appreciate the gravity of the situation, understand the importance of my testimony in this case, and I understand what the defendant has at stake in this case, and I am naturally more cautious in this case than I would be ordinarily.

279 Q. Well, I want you to just express your opinion just as it is in your own mind, Mr. Fitzgerald, now, in regard to this matter. You state you believe they were written by the same party?

A. I believe these papers were written by the same party.

Q. I will ask you to look at these papers that I now hand you——

Mr. EARLY. I object to any extraneous writings being shown witness after he has qualified as an expert, for the reason that extraneous writings not properly identified and not proven to be genuine can not form a proper basis for comparison of handwritings. There is no evidence as to what these might be or what they might not be.

Mr. BISHOP. Well, I will let you see them, Mr. Early.

The COURT. These writings have appeared before, have they, and have been identified?

Mr. BISHOP. They have not been identified by anybody, your honor, but I expect to show that they are files of this court.

Mr. EARLY. If the court please, I shall object to them on the specific ground that the files of the court are not proper to form a basis of comparison.

The COURT. Well, the papers are not yet offered in evidence; they are simply offered for the purpose of comparison, and for the present the court will admit them for that purpose to save recalling the expert.

(To which ruling of the court defendant then and there duly excepted.)

A recess was here taken until 2.15 p. m., the jury being duly cautioned by the court.

After recess further proceedings in the case at bar were had as follows:

WILLIAM L. FITZGERALD was cross-examined by Mr. Early as follows:

280 Q. Mr. Fitzgerald, I believe you stated that you had made a personal examination of those writings yourself?

A. I did.

Q. And your opinion is based upon that examination or comparison as made?

A. Certainly, sir.

Q. Now, I will ask you, Mr. Fitzgerald, if as an expert there is not a probability of yourself or any expert—or rather I will put it, of your-

self making a mistake as to a comparison between different handwritings.

A. Yes, sir; a mistake may be made.

Q. Do you think, Mr. Fitzgerald, that as between hands which may have some similarities that there is a strong probability that a mistake may occur?

A. Well, there is a probability that I might be mistaken.

Q. You think, then, that you might be mistaken as to an opinion derived from a comparison made in that way?

A. My whole testimony is to the effect not that these papers were written by the same person at all. I simply testify that I believe that the same person wrote the different papers.

Q. Then, Mr. Fitzgerald, you offer that testimony as an opinion merely?

A. Certainly, sir.

Q. And at the same time, with your knowledge of the science of handwriting, you are also of the opinion that, as between writings in which there may be similarities, there is a probability of making a mistake?

A. There is a possibility of an expert making a mistake. And so far as the probabilities are concerned, of course, that must relate to the matter before the expert. In some cases his opinion, of course, would be more certain than in others. But at best, I only want to be understood as sta'ing that after as careful an examination as my abilities permitted me to make of the different papers submitted to me, that I have arrived at the opinion that all of the papers submitted were written by the same party. I couldn't testify that they were written
281 by the same party, because I haven't the evidence of my senses to guide me; I didn't see the party write, and consequently I can only testify as to my belief.

Q. And at the same time, Mr. Fitzgerald, as an expert you state, I believe, that there is a probability of making a mistake?

A. I believe that is a generally recognized fact.

Q. And you recognize that yourself?

A. I do in my own case. So far as I am individually concerned I would hesitate to testify any more positively than I have testified in this case—that it is my belief that the same party wrote all of those papers.

Redirect examination by Mr. BISHOP:

Q. Mr. Fitzgerald, you don't mean to say by that at all, do you, that there is a probability or a possibility of your being mistaken in your opinion?

A. No, certainly. I am satisfied in my own judgment that my opinion is correct, or I wouldn't dare to venture it.

Q. Yes; that is what I want to understand. I didn't think I understood you as saying you might be mistaken as to your opinion.

A. Yes; I am not mistaken as to my opinion at all. But, of course, I want to be perfectly understood that I appreciate the importance of the position in which I am placed. I have no hesitation in saying that were the case not of this magnitude, I wouldn't perhaps allude to these doubts in such an emphatic manner as I have in this case.

JOSEPH GOCKING, being recalled by the State, further testified as follows:

Direct examination by Mr. BISHOP:

Q. Mr. Gocking, who was it that took the fragments of the lunch purporting to have been found in St. Peter's Church to the coroner's office?

A. I took it there.

282 Q. You took it there yourself?

A. I did.

Q. Did you deliver it to Dr. Frank yourself?

A. I did.

Q. Where did you get the articles?

A. You mean where did I get them the first time I got them?

Q. Yes; where did you get them when you took them to the coroner's office?

A. I got them out of a locker in the 5th district station. I had them locked up.

Q. They were locked up in a locker at the 5th district police station?

A. Yes, sir.

Q. And it was there you got them and took them direct to Dr. Frank?

A. Yes, sir.

Q. Well, did you deliver them to Dr. Frank just as you took them from the locker?

A. Yes, sir.

Q. Do you know who put them in the locker?

A. I put them in myself.

Q. Where did you first see the articles?

A. In the office in the police station on Saturday night.

Q. Whose office?

A. Captain O'Malley's.

Q. You didn't see them brought there yourself, did you?

A. No, sir.

Q. They were in Captain O'Malley's charge?

A. He gave them to me and told me to take care of them and lock them up.

Q. Were they under lock and key, now, from that time until you took them out to bring them to the coroner's office on Monday?

A. Yes, sir.

283 Cross-examination by Mr. EARLY:

Q. Then you turned them over to the State's attorney, did you?

A. Yes, sir.

Q. Prior to the time you mention when they were brought under your charge you didn't know anything about them?

A. I don't understand.

Q. I say prior to the time you saw them in Captain O'Malley's office you didn't know anything about them?

A. No.

Redirect examination by Mr. BISHOP:

Q. After they were returned to you by Dr. Frank you kept them, you say, under lock and key until the trial?

A. I took them back and locked them up in the same locker, and when I was transferred from the 5th district to the central, I brought them down and locked them up in a locker downstairs.

Q. Was that your own private locker?

A. Yes, sir.

Q. Has anyone else a key to it?

A. Yes; Danaher has a key to it—my partner.

Q. And since the last trial and till the time of this trial again where had they been?

A. In the locker downstairs.

Q. In the same place?

A. Yes, sir.

Q. (By the COURT.) Mr. Officer, do you mean the basket, contents, etc., this lunch and all that referred to here?

Mr. BISHOP. I believe I referred to everything—the dishes, lunch, hat, basket, crackers and cheese, and bottle.

WITNESS. Well, the jumper wasn't in it when I first got it. I put that in after I got it. I put them all together and put a paper around it, tied it up and put it in the locker.

Q. (By the COURT.) You stated, I believe, that you got the jumper and the hat yourself from Dr. Short's residence?

A. Yes, sir; I put them in the basket after I got it.

* * * * * * *

288 Mr. BISHOP. Now, if the court please, I offer in evidence the exhibits that have been introduced here, in order: Exhibit "A," identified by Mr. Ruckersfeldt; Exhibits "B" and "C," identified by Mr. Beckett; Exhibits "E," "F," "G," "H," and "I," indentified by Captain O'Malley.

Mr. EARLY. Now, if the court please, I object to the introduction of the writings which Captain O'Malley obtained, as he has stated, after the prisoner's arrest and incarceration, by artifice and deceit, on the ground that it is an attempt to compel a defendant to manufacture evidence against himself, and for that reason the exhibits offered are not admissible in evidence for the purpose of comparison.

The COURT. Is that your only objection?

Mr. EARLY. Well, that is the first objection.

The COURT. The objection will be overruled, on the ground that it does not appear that the defendant was induced, either by threats, or by fear, or by promises, to make the writings, nor was it done under any duress.

(To which ruling of the court defendant then and there duly excepted.)

Mr. EARLY. Now, if the court please, I will object to the introduction of the writings referred to for the purpose of comparison, for the reason that at the time this case arose there was no statute in this State providing for the comparison of disputed handwritings, and that for that reason the supreme court of this State has uniformly followed the rule of the common law, viz, that irrelevant writings, writings wholly unconnected with the case, not in evidence for any other purpose, which are not admitted by the defendant himself to be genuine, writings
289 which he is not estopped to deny—that these writings come clearly within the prohibited rule under the law in this State; that is,

that they are writings not in evidence for any purpose whatsoever, not connected with the case directly or indirectly, and for that reason the writings are also inadmissible for the purpose of comparison only.

The COURT. Do you wish to submit any argument on that proposition, Mr. Early? There is a statute now, which you are doubtless familiar with, which changes the rule of common law on that question of evidence.

Mr. EARLY. I am well aware of that, your honor. That act was passed in April, 1895, but this case had previously been in the supreme court, and that statute being passed after this case had arisen, after the case had been once before the court, after the evidence had been excluded and held to be incompetent, any later statute which may be passed which changes a rule of evidence to the disadvantage of the defendant is ex post facto and retrospective in its operation. It is prohibited by the Constitution of the United States, art. 1, sec. 10, which provides that no ex post facto law shall be passed. It is prohibited by the constitution of the State of Missouri, in art. 2 and sec. 15, which provides that in this State no ex post facto or retrospective law shall be enacted, and under that same provision of the constitution the supreme court has held that whenever any statute is passed, that that statute is to be construed prospectively, and not retrospectively. The cases cited in the statutes of this State follow the case of Calder v. Bull, reported in 3 Dallas, U. S. Sup. Ct., in which Justice Chase very fully lays down the law, as he conceives it, in regard to what is meant by an ex post facto law. There he defines the question of ex post facto law, as he construes it, to mean, as contained in the Constitution of the United States, any law passed subsequent or passed after an alleged offense which makes greater, less, or different testimony admissible than that which was
290 admissible at the time upon which the alleged offense was committed. That very identical case is cited in the 66 Mo., in which the case of Calder v. Bull is freely quoted and the identical classification of the four divisions of ex post facto law, as construed or settled or set forth by Justice Chase in the U. S. Supreme Court, and the same rule is followed, viz, that any law which changes a rule of evidence to the disadvantage of the defendant, which makes greater, less, or different testimony admissible, is retrospective in its operation. Cooley, in his work on Constitutional Limitations (pp. 318–328), lays down this rule in its broadest sense, and I think follows the law as laid down in the case cited in 3 Dallas, Calder v. Bull, very fully. The same view in regard to ex post facto laws under the Constitution of the United States is followed in Storey on Constitutional Law, in which he makes almost precisely the same reference, and says that that is the established interpretation or the accepted interpretation of the meaning of an ex post facto law as laid down in the Constitution of the United States. (Art. 1, sec. 10.) The same rule is followed in Miller on the Constitution, in which Justice Miller construes the meaning of an ex post facto law to *to* include any law or any act of a legislature which changes to the disadvantage of a defendant any rule of evidence making more, less, or different testimony from that which was admissible at the time of the commission of the alleged offense admissible. And the same rule is followed in Black on Constitutional Prohibitions (sec. 222), which I believe places the

broadest construction, or at least quite fully as broad as any of the other authorities which I have examined. Black says that any legislative act which changes a rule of evidence making more, less, or different testimony admissible from that which was admissible at the time of the commission of the alleged offense is retrospective, and of course ex post facto and therefore void. There is a case
291 reported in the 12 Minn., in which almost this identical point arose. There the question was the proof of marriage. Under the old law marriage could only be proved by direct testimony. Now, a statute was passed by the legislature of Minnesota changing that law and making it possible to establish a marriage by the introduction of indirect testimony. Now, the case arose in exactly the same way in which this case has arisen. The supreme court of Minnesota held that that statute was retrospective, inasmuch as it received or admitted a different class of testimony than that which was admissible at the time of the alleged marriage. Now, in the State of New York in 1880 there was a statute passed almost verbatim with the statute passed by the last legislature in this State in April, 1895. The act passed by the legislature of New York included a provision which was not prohibited by the constitution of the State of New York, in which it stated that this should apply retrospectively, and the courts there, so far as I have been able to find, have construed that inasmuch as there is no absolute prohibition of the enactment of retrospective laws in the State of New York, if special reference is made to a change of a rule of evidence, that then it may lie within the power of the legislature to enact a law. But in this State this enactment refers to no retrospective legislation. That is, there is no reference made to any retrospective operation. It is clearly not the intent of the legislature to enact such a law in this case, or rather that this act should have any retrospective action whatever, but that it shall act pro'pectively and only apply to cases which may arise after its enactment. I believe, your honor, that states my objection to the introduction of the testimony.

The COURT. Do you want this discussion to be heard in the presence of the jury, Mr. Early?

Mr. EARLY. Well, your honor, I'd ask that the jury be excluded.

(The jury was accordingly excluded during the discussion of the objection.)

292 The COURT. Now, I will state the reasoning by which I arrive at a conclusion on this question. The offense under investigation was committed in September, 1894. In the early part of 1895 the legislature enacted the following law:

"Sec. 8944a. Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. Approved April 8, 1895."

Now, before the passage of this law the common-law rule prevailed in this State, to the effect that no writings should be used for the purpose of expert testimony, or for the purpose of comparison with writings which were sought to be proved, except such as were admitted by the defendant

to be genuine. The effect of this statute is to abrogate and do away with that rule. The State, now, under this statute proves several writings to have been made by the defendant after his arrest, and seeks to introduce those writings for the purpose of expert testimony and for the purpose of comparison with another writing claimed to have been made by the defendant, which, if proved, would be competent testimony in the cause. The writings which are now sought to be used for that purpose would not have been competent, therefore, under the old rule of law before the passage of this statute, and it is maintained by the defendant that they are still incompetent, because the statute in question was passed since the alleged offense was committed and, therefore, is an ex post facto law. Mr. Early contends that if the court has any doubt about this question the doubt should be resolved in favor of the defendant, but that is a rule which applies only to facts. If there is any doubt about the truth of the facts, or if there is any reasonable doubt about the person's guilt or innocence, such doubt should be resolved in favor of the defendant; but it is the duty of the court, as I understand it, to decide con-
293 scientiously, fairly, and in the light of all the authorities what is and what is not the law. It is not like the fact being in doubt. It may or may not be a fact. A proposition is law or it is not law, and the court is bound to decide it one way or the other and let the consequences take care of themselves. Therefore I will say here it is not a question of doubt in my mind, but it is a question of what is the law.

Now, in the case of ex parte Bethrum the supreme court cites the case which you have referred to, Mr. Early—case of Calder v. Bull, 3 Dallas, 386, in which Justice Chase pronounces the rule regarding ex post facto law which, so far as I can find out, is taken as the standard definition of what is and what is not an ex post facto law. Our supreme court, in ex parte Bethurum, page 548, vol. 66, says as follows:

"In Calder v. Bull, 3 Dallas, 386, Chase, J., declared an ex post facto law to be one which makes an action done before the passage of the law criminal which was innocent when committed, and punishes the individual who had committed it; or which aggrevates a crime and makes it greater than it was when committed; or which changes the punishment and inflicts greater punishment than the law annexed to the crime when committed; of which alters the legal rules of evidence, and makes less or different testimony than the law required at the time of the commission of the offense sufficient to convict the offender."

That is quoted from the case of Calder v. Bull, which is the leading case upon the question of ex post facto law. The question here comes under the fourth subdivision, for unquestionably the effect of this statute of 1895 is not to increase the punishment, it is not to change the punishment in any way whatever, but if an ex post facto law at all, it is by reason of this fourth classification, which is as follows: "Or which alters the legal rules of evidence and makes less or different testimony than the law required at the time of the commission of the offense sufficient to convict the offender."

294 Now, this writing which is sought to be introduced here, to wit, the order sent to the apothecary for str'chnine, has always been competent testimony if it was written by the defendant, and the effect

of this statute is not to make that writing competent, it is not to make that evidence which before was not evidence, but it is to alter or make different the means by which that writing may be traced to the defendant. As I said a while ago, under the common-law rule, before this statute went into effect only writings admitted by the defendant could be used for the purpose of comparison and for the purpose of expert testimony; but under this law any writings proved to the satisfaction of the court to be genuine writings can be used for that purpose. The effect of this law, therefore, is simply to increase the scope of a large number of writings which may be used for the purpose of such comparison, and for the basis of expert testimony, and in doing that I do not see that it in any way changes the amount of evidence necessary to convict, or the character of evidence, but changes only, as I said, the manner of proving a fact.

Now, in the case of Hopt v. Utah, 110 U. S., 574, the plaintiff, Hopt, had been convicted in Utah of murder, and an appeal was taken by the defendant, and when the case came up in the Supreme Court it was reversed and remanded, and, just as in this case, subsequent to the alleged offense the Territory of Utah passed a law enabling those who were before disqualified, by reason of conviction and sentence to the penitentiary, to testify, and the witness whom the State for that reason had been unable to use before was permitted to testify at the second trial, and he testified to facts incriminating the defendant, and the case was again appealed to the Supreme Court of the United States. In that opinion the Supreme Court held that a law was not ex post facto which was passed subsequent to a crime, making a witness competent who before and at the time of the commission of the offense was incompetent. It is making a fact susceptible of proof by evidence which at the
295 time of the commission of the offense was incompetent evidence. Suppose that when the defendant wrote these writings which are sought to be introduced in evidence here he had made a statement implicating himself to a person who was under the ban of conviction and incompetent to testify, and after that was done a statute was passed enabling that party to testify, would that be an ex post facto law? That case of Hopt v. Utah says not. It simply unlocks the mouth of the witness and enables him to prove a fact which at all times, if it could be proved, was competent. Here is a writing which at all times has been competent. At the time the defendant executed the writings here, by which the writing in controversy is sought to be proved, they were incompetent. Since then they have been made competent for the purpose of proving the writing—the order on the druggist—it seems to me. In other words, the legislature has enabled certain writings to speak which, at the time they were made, could not speak; has enabled writings to testify by reason of this law which before could not testify.

Now, in the case of O'Bryan et al vs. Allen et al, in 108 Mo., p. 227, without reading any part of the opinion, I will simply read the syllabus:

"Evidence: Change of law making witnesses incompetent. Laws which change the rules of evidence relate to the remedy only, and may be applied to existing causes of action, and this is true, although the effect of the change is to render one incompetent as a witness who before was competent."

It was held that such an act of the legislature is not an ex post facto law. It simply changes the rules of evidence, simply changes the remedy. That ruling of the Supreme Court is maintained and justified by the following authorities:

State v. Jackson, 80 Mo., 175.

Cooley on Constitutional Limitations, 3d ed., p. 367.

State v. Johnson, 81 Mo., p. 60.

Hope Mutual Insurance Co. v. Flynn, 38 Mo., 48.

St. Louis v. Oeters, 36 Mo., 456.

296 Wharton on Criminal Evidence, 9th edition, note in section 360a, cites the case of Hopt v. Utah as one of the authorities for his text.

From the authorities that I have just cited, reasoning from those by analogy, and going back to the reasons for inhibiting an ex post facto law, I am forced to the conclusion that this is not an ex post facto law in the sense that is used in our Constitution, and that so our Supreme Court has practically held in this case I have just referred to of O'Bryan et al. vs. Allen et al.; therefore my ruling will be that the writings which the State has offered, which have been identified by the witnesses O'Malley and Gocking, prove by them to my satisfaction to have been made by the defendant, and to be his genuine writings, and are competent for the purpose of comparison with other writings which the State may wish to prove to have been executed by the defendant, and for the purpose of expert testimony.

(To which ruling of the court defendant then and there duly excepted.)

Mr. EARLY. Now, if the court please, I will also object to the admission of these writings on the ground that before any extraneous writing can be offered for the purpose of comparison with other writings the proof required in that case under the new law must be positive, that the statement of the act of the legislature about the question of proof to the satisfaction of the court requires that extraneous writings not in anywise connected with the case, save only for the purpose of comparison, must be absolute and positive.

The COURT. Such writings as are "proved to the satisfaction of the judge to be genuine shall be permitted," etc. These writings are proved by witnesses who were present and saw them made; therefore I take it they come within that law. They identified the writings, the paper upon which the writings were made, by marks which they made at the time upon the papers, and also identified them by the contents, the writings themselves. I do not see proof of genuineness of writing could be more direct, specific, or clear than was the proof of the papers which
297 have been identified by the witnesses. The objection is therefore overruled.

(To which ruling of the court defendant then and there duly excepted.)

(Jury brought in.)

Whereupon Mr. Bishop read in evidence Exhibit "A," written in ink, which was in words and figures as follows, to-wit:

"Please send by bearer
one 1.3 of strehnine &
oblige Dr. Kebber
3832 Pine St."

Mr. Bishop next read in evidence Exhibit "B," an envelope, postmarked "Saint Louis, Aug. 2, 11 p. m., '84," and bearing a 2-c. postage stamp, there being written upon the envelope in ink, "Beckard, Choir Master St. Peter's Church, Lindell & Spring Ave."

Mr. Bishop also read in evidence Exhibit "C," written in ink, being in words and figures as follows:

"Aug 2nd 1894
My dear Beckard i am
sorry o sorry indeed to say to
you that the music commite
is so dissatisified with your
undertaking to play their
grand new organ as they
call it as a friend to you
i must say that there will most
certainly be a change made
some are saying you knows
nothing about playing an
organ while a balance says
you cant even play a pianna
298 i felt so bad over this felt
it my duty to give you an
understanding of what they
are going to do now i
must say to you of that i
know you have a finer
choir in st peters church
now than ever she were
known to have i have heard
men who knew all about
music say that they would
not wish a better organist
an the training of your
choir they have said to me
were magnificent Beckard
you are not an organ maker
to suit any ones preference to
to the sound of the organ so
if i were you i would let
them persue their course for
all you may do now will be
counted nothing i have worried
with this committee time an again
asking them to be contented saying
to them that we can get a
more faithful worker than you
are their reply were you knew nothing
some replyed you knew
to much about music an
not enough about farming
some saying they had heard
enough of your smart talk

the first beginning of all this
rumor came from that low
irish Joe the sexton there of
299 the church 3 or 4 of the gentlemen
of the music committee came in
the church quite a good while a
go one asked had or did you
do any practicing so he spoke
up and said you were tramping
around in the church the best
part of your time an one half of
your time you had some one
to teach you how to play the organ
an it soon reach the committee
an from one word to another
they said Joe were about right an
were sensible to notice such thing
an not long since he told some
one of the vestry a great deal you
should said about no one in
st peters church should not
impose on you an you did
not care whether you played
the organ right or wrong for you
got no credit either way through the
transactions of our business i have
found that Joe both a tadling liaar
an hypocrit will have a good
talk with you after the next meeting
will also come verry near getting rid
of the mr Joe should he attending to
the cleaning of the church an the yard
it would not look so much like a pastor
for cattle or some place for rent instead
of seeing after your business Yours Resp
will not give name but will see farther
i will make every efford to get
rid of Mr Joe his interfearing."

300 Mr. Bishop next read in evidence Exhibit "E," said exhibit being an envelope, upon which was written in ink:

"Mr Beckett Organist
st peters church
Lindell Spring ave."

Mr. Bishop also read in evidence Exhibits "F," which was in words and figures as follows:

"St. Louis, Oct. 1st 1894.

"Mr. Beckett my dear sir i know of no one having no ill feeling towards you or mr cunningham nor i dont know any thing about the basket an i dont know who bought the basket to the church

"GEO. THOMPSON"

(The last mentioned exhibit was written in ink on portion of letter-head bearing the printed words "Office of Police District." "St. Louis" and "189" also being printed.)

Mr. Bishop next read in evidence Exhibit "G," written in pencil, which was in words and figures as follows:

"Dr dear sir will you come
to see me at once as i
am anxious to see you
Yours obedient servant
Geo. Thompson."

Said exhibit was addressed on the back in pencil as follows:

"Rev. Wm. Short
3692 West Pine st"

Mr. Bishop next read in evidence Exhibit "H," an envelope, upon which was written in pencil:

"Charity Thompson
3718 Morgan st
city"

301 Mr. Bishop also read in evidence Exhibit "I," written in pencil, which was in words and figures as follows, to wit:

"Oct 1st 1894
"Charity i hope you are
doing well you may
come to see me at once
if you like to an thinks it
not to early for you to
come out i wants to see
verry bad i wants to see
mr whitious an Edd goodloe
at once Edd hawkings also
charlie an mr woods
you may bring me some
thing to eat if you like to they
are not straving me out here
"Geo. Thompson
"Charity dear wife i
i hope you are getting
well i also hope you
are not in grief Mr short
will come to see me at
once i hope i hope baby is
well an not so fretful
as have ben i were so
afraid you would try to
come to see me to day an
make your self sick
remeber me in prayer
for my trust is in the

Lord Mr & Mrs rev short
has ben to see you i
guess an so has mrs mclean
never did i think dear that
i would come to be locked
302 in Prison but i am
innocent an tries to make
my self satisfied good by
"George Thompson
"Charity Thompson
3718 morgan"

On the outside was written in pencil:

"Mrs charity thompson
3718 morgan"

Said exhibits were submitted to the jury for their examination.

* * * * * * *

391 And afterwards, to-wit, on the 5th day of January, 1897, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, RESP.,
*vs.*
GEO. THOMPSON, APP.

Comes now the said appellant by attorney, and files his motion to prosecute the appeal herein as a poor person.

Which said motion was in words and figures as follows, to wit:

In the supreme court, State of Missouri.

STATE OF MISSOURI, RESPONDENT,
*vs.*
GEORGE THOMPSON, APPELLANT. } Murder, first degree.

*To the honorable justices of the supreme court, State of Missouri.*

The appellant herein, George Thompson, respectfully represents to the court that he is a poor person and unable to prosecute such appeal and to pay the costs and expenses thereof. Wherefore he prays for an order of the court allowing him to file the suit above mentioned and to prosecute the same as a poor person.

GEO. THOMPSON.

STATE OF MISSOURI,
*City of St. Louis, ss:*

Subscribed and sworn to before me this 29th day of December, 1896.

My term expires May 2, 1899.

MARION C. EARLY,
*Notary Public, City of St. Louis.*

And afterwards, to wit, on the 6th day of January, 1897, the further following proceedings were had in said cause, viz:

STATE OF MO., RESP.,
*vs.*
GEO. THOMPSON, APP.

Now at this day, it is ordered by the court that this cause be filed, advanced, and set for hearing February 3, 1897.

392 And afterwards, to wit, on the 3rd day of February, 1897, the further following proceedings were had in said cause, viz:

STATE OF MO., RESP.,
*v.*
GEO. THOMPSON, APP.

Come now the said parties, by attorneys, and after argument herein submit this cause to the court.

And afterwards, to wit, on the 8th day of June, 1897, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, RESPONDENT,
*vs.*
GEORGE THOMPSON, APPELLANT.
Appeal from St. Louis criminal court.

Now at this day come again the parties aforesaid, by their respective attorneys; and the court, here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said St. Louis criminal court rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended, and have therefor execution. And it is further considered and adjudged by the court that the judgment and sentence of the St. Louis criminal court passed upon the said George Thompson, appellant herein, to be executed on the 28th day of August, A. D. 1896, be in all things executed by the sheriff of the city of St. Louis, on Thursday, the 8th day of July, 1897.

(Opinion filed.)

Which said opinion was in words and figures as follows, to wit:

In the supreme court of Missouri. Division No. 2. April term, 1897.

STATE OF MISSOURI
*vs.*
GEORGE THOMPSON, APPELLANT.

At the November term, 1894, of the St. Louis criminal court the defendant was indicted for the murder, in the first degree, of Joseph M. Cunningham, the sexton of St. Peter's Episcopal Church in the city of St.

393 Louis. He was arraigned, tried, and convicted of that crime, and appealed to this court. The judgment of the criminal court was reversed February 4th, 1896. He was again tried and con-

victed on May 29th, 1896. After the usual motions for new trial and in arrest, the cause was again appealed to this court. The opinion of this court on the previous hearing is reported in 132 Mo., 301. The evidence on this last trial was substantially the same as on the first. Whatever changes occurred will be noted if necessary in the opinion of the court.

At the time the indictment was found and of the first trial of the case the laws of this State only made provision for one judge for the St. Louis criminal court. By an act of the general assembly approved by the governor March 26, 1895, the said criminal court was divided into two divisions and provision made for an additional judge for the second division thereof, said act conferring upon each division of said court all the powers and jurisdiction theretofore had and exercised by the said court. By this act Judge Henry L. Edmunds, the then incumbent, remained judge of division No. one of said court, and Hon. Thomas B. Harvey was appointed judge of the other division and duly qualified as such. Upon the remanding of this cause it was again docketed in Judge Edmunds' division and was set for trial March 9th, 1896. On that day the defendant filed his application for a change of venue, verified by himself and two compurgators, as required by statute. In his application he alleged that Judge Edmunds would not give him a fair and impartial trial and would not fairly and impartially pass upon his said application for a change of venue, and that the inhabitants of the city of St. Louis and the county of St. Louis were so prejudiced against him he could not obtain a fair and impartial trial. Judge Edmunds sustained the application so far as it disqualified him from trying the case, and transferred the cause to Judge Harvey's division; to which transfer defendant objected and demanded the election of a special judge. The cause having been transferred, on March 30th, 1896, defendant filed his plea to the jurisdiction of said division of the court, which plea was overruled, and defendant excepted. Defendant then filed affida-
394 vits in support of his application for a change of venue and again objected to the jurisdiction of Judge Harvey, on the ground that the act of 1895 creating said division was ex post facto, was unconstitutional and void, which objection was again overruled and exceptions taken and saved. Thereupon Judge Harvey and division No. 2 of said St. Louis criminal court heard the evidence for and against said change of venue and denied the same, and exception was duly saved. On April 6 the defendant filed an application for continuance on the ground of an absent witness, one G. M. Lewis, whom defendant believed resided in St. Louis or Denver, Colorado; that he believed he could obtain the testimony of said witness in sixty days; that more than a week prior to April 6th he had issued a subpœna for said Lewis, and another, on April 4th, both of which were returned "not found." This application was overruled, and defendant excepted. Upon the application of the State the cause was continued to the next term on account of an absent witness, and the cause set down for May 25, 1896, on which last-mentioned day both sides announced ready for trial, and the trial proceeded, resulting in a verdict of guilty. Having already passed upon the sufficiency of the indictment and arraignment on the former appeal, it is not necessary to advert to those subjects again.

I.

The act of March 26th, 1895, creating two divisons of the St. Louis criminal court, of St. Louis, giving to each the same jurisdiction which was possessed and exercised by that court prior to that time, and thereby simply increasing the efficiency of said court for the disposition of the rapidly accumulating business therein, was clearly within the powers of the legislature. The State has no higher duty than to furnish courts in which public prosecutions may be heard and speedily terminated. The abolition of courts which have proved to be inefficient and the creation of others, leaving unimpaired all the guarantees of the State and Federal constitutions, are in no proper sense ex post facto laws. Cooley on Const. Lim. (5 ed.), 329; State vs. Jackson, 105 Mo., 196;
395 State vs. Sullivan, 14 Rich. (So. Car.), 281; Wales vs. Belcher, 3 Pick. (Mass.), 508; Com. vs. Philips, 11 Pick., 28; State vs. Moore, 15 Rich. (So. Car.), 57.

II.

It is objected that Judge Edmunds erred in refusing to call in a judge of another circuit to decide the application for change of venue and in transferring the case to Judge Harvey's division of the court. Counsel's attention had probably not been called to the amendment of section 4174 R. S., 1889, by the act of March 18th, 1895. (Acts 1895, page 163, section 2.) By this amendment so much of section 4174, as it stood prior thereto, which required the calling in of another judge to decide an application for change of venue was repealed. So that Judge Edmunds only had for his consideration an application for change of venue from his court on account of his alleged prejudice. By section 5 of the act of March 26th, 1895, he was required to transfer the case to Judge Harvey's division, and he rightly so ordered. No constitutional question was involved in his action in so doing. It was a mere matter of procedure which it was the duty and right of the legislature to prescribe for the disposition of such cases, and was in no sense an ex post facto law.

III.

Neither was there such error in the refusal of Judge Harvey to grant a change of venue as calls for review by this court. He heard the witnesses, and found as a fact that there was no such prejudice on the part of the inhabitants of St. Louis as would prevent a fair and impartial trial of the defendant, and that finding this court will not disturb in the absence of a showing of abuse of discretion. No doubt exists of the power of the State to prescribe the terms and conditions upon which changes of venue may be granted. There is no constitutional right to such a change.

The State very wisely requires the prosecution to be had in the county in which the offense is committed unless the court is satisfied by the evidence that a fair trial can not be had therein.

IV.

396 There was little merit in the application for continuance. No diligence had been shown to obtain the evidence of the witness,

and ample time intervened to find him in the fifty days which intervened after the court denied the motion and before the date fixed upon for the trial, if such a witness really was in existence. Moreover, when defendant subsequently went to trial without objection, under the circumstances the point was waived.

V.

The defendant objected to the evidence of Dr. Sanger, who testified as an expert chemist to an examination of the viscera of the deceased and to the finding of strychnine therein, on the grounds that he had not been sworn prior to taking charge of the viscera, and had not made the analysis while under oath. It is sufficient to say that no precedent for such a position can be found in any treatise on evidence. We can discern no reason why such suppletory oath should be required of an expert witness as a condition precedent to the admission of his evidence. The law makes no such distinction between witnesses. The objection was very properly overruled.

No error was committed in refusing to strike out the evidence of Nettie Simon merely because she could not definitely identify the man to whom she sold the charlotte russe a few hours before the poisoning. Her evidence was a material link in the chain of circumstances tending to connect defendant with the crime. Edward Schmidt's evidence as to the sale of a bottle of beer to defendant, about noon of the day of the poisoning, of the same brand and brew as that of the empty bottle found in the lunch basket of poisoned lunch was clearly competent.

When the case was here on a former occasion we held that the statements of the organist, Beckett, as to the contemporaneous statement of the deceased, when they sat down to eat the lunch, that it was brought to him by "Mrs. McLean's man" (who was shown to be the defendant), was a part of the res gestae, and as such admissible. To that ruling we still adhere. (State vs. Thompson, 132 Mo., 321.)

VI.

We have gone through the above assignments because of the
397 importance of the case; but the point of supreme interest to the defendant is the alleged error in admitting certain letters written by the defendant to his wife and to Dr. George for the purpose of comparison with the prescription for strychnine and the threatening letter to the organist. The judgment was reversed on the former appeal because the court admitted these writings for the purpose of comparison. (See State vs. Thompson, 132 Mo., 321.) Since the first trial, however, the general assembly has passed an act which provides that "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of genuineness or otherwise of the writing in dispute." (Session Laws of Missouri, 1895, p. 284.) It is conceded that if this act is constitutional and applies to this case, no error occurred in admitting these letters; but defendant earnestly contends that if this act is to be construed so as to admit this evidence in this case, it is unconstitutional because it is a violation of article 1, section 10, of the Constitution of the United States, and article 2, section

15, of the constitution of Missouri, which forbid the passage of an ex post facto law. Chief Justice Marshall defined an ex post facto law to be one "which renders an act punishable in a matter in which it was not punishable when it was committed." (Fletcher vs. Peck, 6 Cranch, 167.) Chancellor Kent commends this definition, asserting that it "is distinguished for its comprehensive brevity and precision." Judge Chase's classification of ex post facto laws in Calder vs. Bull, 3 Dallas (U. S.), 386, has been generally received as an authoritative statement as to the character of such laws. His classification is as follows: 1. "Every law that makes an act done before the passing of the law, and which was innocent when done, criminal, and punishes such action." 2. "Every law that aggravates a crime or makes it greater than it was when committed." 3. "Every law that changes the punishment and inflicts
398 a greater punishment than the law annexed to the crime when committed." 4. "Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender."

It can not be seriously contended that the defendant's case falls within either of the first three classes. Prior to the commission of the crime charged to have been committed by defendant it was the recognized law of this State that unless writings were in evidence for some legitimate purpose in the case, and were admitted to be in the genuine handwriting of the party, or he was estopped from denying their genuineness, they could not be admitted for the purpose of comparison with disputed writings, or for the purpose of proving handwriting.

Does the act of 1895, page 284, to be known as section 8944a, above quoted, which renders writings, proved to the satisfaction of the judge to be genuine, admissible for the purpose of comparison, fall within the fourth class of ex post facto laws, which alter the legal rules of evidence so as to receive less or different testimony in order to convict the offender? As this fourth class rests entirely upon the authority of the Supreme Court of the United States, we can do no better than to defer to that court for the interpretation of this language, which has received but little comment or explanation from our law writers. In Hopt v. Utah, 110 U. S., 574, this question arose in this way: By the laws of Utah "persons against whom judgment had been rendered upon a conviction of felony, unless pardoned by the governor, or such judgment had been reversed on appeal, should not be witnesses." (Compiled Laws Utah, sec. 378.)

Hopt was indicted for murder. After the date of the alleged homicide, but prior to the time he was put upon trial, an act of the legislature was passed which repealed said section 378, and made such convicted persons competent witnesses.

One Emerson, who had been convicted of a felony, to wit, murder, was offered as a witness against Hopt, and he objected to his competency, but his objection was overruled. Hopt insisted that if the
399 repealing act of 1882 was to be construed as permitting this convicted felon to testify against him it was an ex post facto law within the meaning of the Constitution of the United States in that it permitted the crime charged to be established by witnesses whom the law,

at the time *of* the homicide was committed, made incompetent to testify in any case whatever. But the Supreme Court said: "Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage, for they do not attach criminality to any act previously done and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree or lessen the amount or measure of the proof which was made necessary to conviction when the crime was committed. Alterations which do not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to guilt, but leaving untouched the nature of the crime and the amount or degree of proof essential to conviction, only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only in which no one can be said to have a vested right, and which the State upon grounds of public policy may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had without reference to the date of the commission of the offence charged." Unless, then, we can say upon principle that there is a difference between rendering competent an incompetent witness after the commission of the crime charged, and the rendering competent written evidence which was incompetent at the time of the act charged, by subsequent general legislation, then such legislation is not ex post facto. Can such a distinction be maintained? In the one case, so long as the law renders a convicted felon incompetent, no conviction could be had which depended upon his testimony. In the language of counsel,
400 to all intents the fact which his evidence would disclose was the same as if it never existed; but with the restriction upon his testifying removed that fact, which all along existed, can be shown to establish the ultimate fact. How does it differ, then, from the writing offered? One way of establishing the genuineness of a disputed writing is by comparison, but by the course of decision in this State prior to and at the time of the alleged murder in this case, the writing offered for comparison with the disputed writing must have been in the case for some legitimate competent purpose, and its genuineness admitted, or the party estopped to deny it. The act of 1895 required the writing offered for comparison to be proved to the satisfaction of the court to be genuine, and, if so, then permitted them to be examined and considered with the disputed writing. In either case that which was incompetent at the time the act was committed is rendered competent by the subsequent law. We confess we are unable to differentiate between the two. If one is not ex post facto neither is the other. It will be observed that no particular weight is attached to the evidence of these writings when admitted. They are simply permitted as evidence before the jury. The jury are left to determine their similarity to the disputed writing, and the right to attack these writings themselves is open to the prisoner and his counsel. They are offered solely as a means of arriving at an ultimate fact. The law raises no presumption about them nor ascribes any special probative force to them. Just as in the case of the convicted felon. Though admitted

to testify, the jury are still to determine whether they will or will not credit his evidence. Judge Cooley, in his work on constitutional limitations (5 Ed.), 329, says: "But so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice and heard only by
401 the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it can not lawfully, we think, in so doing dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."

In Robinson v. The State, 84 Ind., 452, it was held that a statute providing that "in all questions affecting the credibility of a witness his general moral character may be given in evidence," was not ex post facto because it allowed a defendant's character to be impeached in a prosecution for a crime committed before the passage of the act.

In Mrous vs. State, 21 S. W. Rep., 764, the court of criminal appeals of Texas held that removing restrictions upon the competency of certain classes of persons as witnesses relates to modes of procedure only in which no one can be said to have a vested right and which the State, on grounds of public policy, may regulate at pleasure.

Said the court: "It is certainly difficult to understand how opening new sources of light or increasing the means of proving or detecting crime can be said to require less evidence or become ex post facto." See also Laughlin vs. Com., 13 Bush (Ky.), 261.

This court, in O'Brien v. Allen, 108 Mo., 227, held that laws which change the rule of evidence relate to the remedy only, and may be applied to existing causes of action without infringing upon the constitutional guarantees against retrospective legislation.

In Missimer v. McCray, 113 Mo., 382, it was held that no party has a vested right in the evidence of a witness, and his competency must be determined at the time the evidence is offered in court. If competent when his deposition is taken, and subsequently rendered incompetent, his evidence must be rejected. The rule operates both ways. Our conclusion is that the act does not permit the conviction of defendant on less evidence than was required prior to its passage. It is an exer-
402 cise of the power of the State to provide methods of procedure in her courts. As to all trials occurring after its enactment it was prospective and not retroactive. That no vested right of defendant was disturbed by said act; that it is not obnoxious to the charge of being ex post facto within the meaning of the State or Federal Constitution. We have given the case a careful examination and have thoroughly considered the objections and argument of the counsel for defendant, but have been unable to agree with him. We desire to commend him for the ability and earnestness with which he has defended the prisoner, without fee or reward, in the discharge of his duty to the court which appointed him.

The judgment of the St. Louis criminal court is affirmed, and the sentence of the law as therein pronounced is ordered to be carried into execu-

tion by the sheriff of the city of St. Louis. Burgess, J., concurs. Sherwood, J., will express his views in a separate opinion.

JAS. B. GANTT.

And afterwards, to wit, on the 16th day of June, 1897, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, RESP.,
*vs.*
GEORGE THOMPSON, APP.

Come' now the said appellant by attorney, and file' his motion for rehearing herein.

Which said motion for rehearing was in words and figures as follows, to wit:

In the supreme court of Missouri, October term, 1897. Division No. 2.

STATE OF MISSOURI, RESPONDENT,
*v.*
GEORGE THOMPSON, APPELLANT.

Now comes George Thompson, the above-named appellant, by his attorney, and moves the court to set aside its decision and judgment rendered herein on the 8th day of June, 1897, affirming the finding
403 and judgment of the circuit court of the city of St. Louis, and to grant him a rehearing for the following reasons, to wit:

The judgment of this court in the admission of certain handwriting for the purpose of comparison, as shown by the record, pages 309–319, under section 8944a, Session Laws of Missouri, 1895, is in conflict with an express statute, namely, Art. I, sec. 10, Constitution United States, and of Art. II, sec. 15, constitution of Missouri, which provides that no ex post facto law or retrospective legislation shall be passed by the general assembly.

This act, namely, sec. 8944a, Session Laws of Missouri, 1895, having been passed long after this appellant had been indicted, is ex post facto as to this cause, and in conflict with the clauses referred to of the Federal and State constitutions.

Wherefore this appellant prays that the judgment herein may be set aside and a rehearing granted.

M. C. EARLY,
*Attorney for Appellant.*

And afterwards, to wit, on the 22nd day of June, 1897, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, RESP.,
*v.*
GEORGE THOMPSON, APP.

Now at this day the court, having fully considered and understood the motion' heretofore filed for rehearing herein, doth order that said motion be, and the same are hereby, denied.

And afterwards, to wit, on the 1st day of July, 1897, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, RESP.,
*v.*
GEORGE THOMPSON, APP.

Comes now said appellant, by attorney, and files his motion to transfer this cause to the court in banc.

Which said motion to transfer to court in banc is in words and figures as follows, viz:

In the supreme court of Missouri. October term, 1897. Division No. 2.

STATE OF MISSOURI, RESPONDENT,
*v.*
GEORGE THOMPSON, APPELLANT.

Now comes George Thompson and moves this honorable court to transfer the cause herein to the supreme court of Missouri in banc for the reason that the same involves a Federal question in this, to wit:

After this defendant's arrest and incarceration on September 29th, 1894, certain members of the St. Louis police force claimed to have obtained from him certain letters or writings which had no connection with the crime with which he is charged. The same were sought to be introduced in evidence for the purpose of comparing said writings with a certain forged order for strychnine, and an anonymous letter supposed to contain an overt threat against the deceased, and by means of such comparison to directly connect the defendant with the alleged crime. It is not claimed by the prosecution that the said writings first above referred to had any connection with the case.

At the trial of the case in March, 1895, the court admitted these writings, upon proof of their genuineness, for the purpose of comparison. The case was appealed, and because of the erroneous admission of the writings referred to was reversed and remanded by the supreme court of Missouri.

At the time of defendant's arrest there was no statute providing for the admission of handwriting for comparison only, and under numerous ruling' of the supreme court of Missouri extraneous writings could not be proven genuine merely for the purpose of comparison.

While this case was pending for the first time in the said supreme court, and long after defendant had been arrested, indicted, and once tried, the legislature changed the rule of evidence referred to, and upon a retrial of this cause in May, 1896, the court, over defendant's
405 objection, admitted the same irrelevant writings, under section 8944a, Session Laws of Missouri, 1895, for the purpose of comparison only, upon proof of their genuineness. The defendant objected to the admission of these writings for the purpose of comparison, as aforesaid, under section 9844a, Session Laws of Missouri, 1895, for the reason that the same is in violation of Art. II, sec. 10, Constitution of

United States, and in violation of Art. II, sec. 15, constitution of Missouri, which said sections provide that no ex post facto law shall be passed.

The defendant was found guilty as charged on May 29th, 1896, and within four days thereafter, to wit, on June 2nd, 1896, and at the same term of said court, this defendant filed his motion for a new trial, alleging, among other things, that the court had erred in the admission of certain irrelevant writings as aforesaid, for the purpose of comparison, under section 8944a, Session Laws of Missouri, because the same was ex post facto as to this cause, and in violation of Art. I, sec. 10, Constitution of United States, and in violation of Art. II, sec. 15, constitution of Missouri; which said motion for a new trial was by the court overruled on July 21st, 1896, to which ruling of the court defendant duly excepted.

On July 23rd, 1896, the defendant filed his motion in arrest, alleging, among other things, the erroneous admission of certain writings in evidence as aforesaid, for the purpose of comparison, under section 8944a, Session Laws of Missouri, 1895, because the same was ex post facto as to this cause, and in violation of Art. I, sec. 10, Const. U. S., and of Art. II, sec. 15, const. of Missouri; which said motion was by the court overruled on July 27th, 1896, to which ruling of the court defendant duly excepted.

After the defendant had been duly sentenced to be executed, an appeal was granted to the supreme court of Missouri, where the said cause has been heard in division number two of said court, and the said court rendered judgment on June 8th, 1897, affirming the judgment of the said circuit court of St. Louis; and on June 16th, and within ten days thereafter, this defendant filed a motion *ofr* a rehearing; which said
406 motion was by the court overruled on June 22nd, to which ruling of the court defendant duly excepted.

Wherefore this appellant prays this honorable court to transfer said cause to the supreme court of Missouri, sitting in banc, for further hearing.

Respectfully submitted.

M. C. EARLY,
*Attorney for Appellant.*

And afterwards, to wit, on the 3rd day of July, 1897, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, RESP.,
*vs.*
GEORGE THOMPSON, APP.

Now at this day the court, having fully considered and understood the motion heretofore filed to transfer this cause to the court in banc, doth order that said motion be, and the same is hereby, sustained.

And afterwards, to wit, on the 6th day of July, 1897, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, RESP.,
*vs.*
GEORGE THOMPSON, APP.

Now at this day it is ordered by the court that this cause be set for hearing on the first day of the October term, 1897.

And afterwards, to wit, on the 12th day of October, 1897, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, RESP.,
*vs.*
GEORGE THOMPSON, APP.

Comes now the said parties, by attorneys, and submit this cause to the court on briefs.

And afterwards, to wit, on the 16th day of November, 1897, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, RESPONDENT,
*vs.*
407 GEORGE THOMPSON, APPELLANT. } Appeal from St. Louis criminal court.

Now at this day come again the parties aforesaid by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises doth consider and adjudge that the judgment aforesaid in form aforesaid, by the said St. Louis criminal court rendered, be in all things affirmed and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. And it is further considered and adjudged by the court that the judgment and sentence of the St. Louis criminal court passed upon the said George Thompson, appellant herein, to be executed on the 28th day of August, A. D. 1896, be in all things executed by the sheriff of the city of St. Louis on Friday, the 7th day of January, 1898.

(Opinion filed.) Which said opinion was in words and figures as follows, to wit:

In the supreme court in banc, October term, 1897.

STATE
*v.*
THOMPSON, APLT. } No. 8432.

OPINION IN BANC.

Per curiam: The foregoing opinion of Judge Gantt was delivered while this cause was pending in the second division of the court. Afterwards the case was transferred to the court in banc where it has been fully considered by all the members of the court, a majority of whom agree to affirm the judgment of the trial court on the grounds stated in said opinion, and to adopt said opinion as that of the court in banc. The judgment is affirmed accordingly, Gantt, MacFarlane, Burgess, Robinson, and Brace, JJ., concurring, and Barclay, C. J., and Sherwood, J., dissenting.

And afterwards, to wit, on the 16th day of November, 1897, the further following proceedings were had in said cause, viz:

408 STATE OF MISSOURI, RESP.,
*vs.*
GEORGE THOMPSON, APP.

Now at this day comes the Honorable Shepard Barclay and files his dissenting opinion in said cause.

Which said opinion is in words and figures as follows, to wit:

In the supreme court in banc, October term, 1897.

STATE
*v.*
THOMPSON, APPLT.

DISSENTING OPINION.

Certain testimony declared by the second division of this court inadmissible under the law in force at the time of the first trial of this cause (132 Mo., 301) is held by my learned brother Gantt to have been properly admitted at a later trial, because of the passage of a statute in the meanwhile authorizing the use of such testimony. (Laws 1895, p. 284.) The said act of 1895 does not in express terms purport to apply to then pending causes.

Without discussing whether that statute falls under the ban of the constitution as an ex post facto or a retrospective law, it seems to me, with due respect, that the existing law of Missouri does not sanction the application of such a statutory change in the rules of evidence to criminal proceedings already begun.

The general statutes governing the effect of legislation in Missouri appear to disclose an intent to forbid the introduction into pending criminal cases of such an alteration in the law as the said act of 1895 produces.

It may be well to mention here certain sections of our statute bearing on this question.

"SEC. 6594. Former law, when not revived. When a law repealing a former law, clause, or provision shall be itself repealed it shall not be construed to revive such former law, clause, or provision, unless it be otherwise expressly provided; nor shall any law repealing any former law, clause, or provision be construed to abate, annul, or in anywise affect any pro-ceedings had or commenced under or by virture of the
409 law so repealed, but the same shall be as effectual and be proceeded on to final judgment and termination as if the repealing law had not passed, unlesss it be otherwise expressly provided."

"SEC. 6597. Fine incurred, not affected by repeal of law. No offense committed, and no fine, penalty, or forfeiture incurred prevoius to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the trial and punishment of such offenses and the recovery of such fines, penalties, and forfeiture shall be had in all respects as if the provisions had remained in force."

"SEC. 6598. Actions pending at time of repeal. No action, plea, prosecution, civil or criminal, pending at the time any statutory provisions shall be repealed, shall be effected by such repeal; but the same shall proceed in all respects as if such statutory provisions had not been repealed, except that all such proceedings had after the time of taking effect of the Revised Statutes shall be conducted according to the provisions of such statute, and shall be in all respects subject to the provisions thereof, so far as they are applicable."

Section 3972, founded on section 6597, but introduced as a new section in the criminal code of procedure of 1879 (R. S. 1879, sec. 3151), indicates the same legislative intent (as to the point of present discussion)

manifested in the sections previously quoted, except that it mercifully gives to one accused of crime the benefit of any change of law that may reduce the penalty for the offence.

The exception stated in the latter lines of section 6598 suggests that the intention of the lawgivers was to apply to pending cases any change of procedure that might be made by a general revision of the statute, as well as to suppress the abuse of permitting interested parties to procure statutory amendments of the law to fit the needs of their own cases at time when no close scrutiny of such amendments was likely to occur. The supposed vigilance of those engaged in the decennial revision of the statute law is evidently regarded as a sufficient protection against the danger of legislation for particular cases which section 6598 is designed to prevent.

If this view of the meaning of that section is correct, there can be no doubt that it governs the pending appeal, for the submission of testimony to support the State's case, at a trial upon an indictment for
410 murder, is plainly a part of the "proceedings" in the cause referred to in the section cited.

My interpretation of our laws above mentioned is that they forbid, by clear implication at least, the application of the act of 1895 to the case at bar. Hence my dissent to the judgment of affirmance.

Whatever may be our impression of the merits of the defendant's case, he nevertheless is entitled to a fair trial and to the benefit of every safeguard afforded him by the laws of the land.

SHEPARD BARCLAY.

And afterwards, to wit, on the 19th day of November, the further following proceedings were had in said cause, viz:

411 STATE OF MISSOURI, RESP., )
*vs.*
GEORGE THOMPSON, APP. )

Comes now the said appellant, by attorney, and files his motion for a rehearing herein.

Which said motion for rehearing was in words and figures as follows, to wit:

In the supreme court of Missouri. October term, 1897. In banc.

STATE OF MISSOURI, RESPONDENT, )
*vs.*
GEORGE THOMPSON, APPELLANT. )

Comes now George Thompson, the above-named appellant, by his attorney, and moves the court to set aside its decision and judgment rendered herein on the 16th day of November, 1897, affirming the finding and judgment of the circuit court, city of St. Louis, Missouri, and Division No. 2 of this honorable court, and to grant him a rehearing for the following reasons, to wit:

The judgment of this court rendered as aforesaid with respect to the admission in evidence of certain handwritings for the purpose of comparison, as appears from the record, pages 309–319, inclusive, under

section 8944a, session laws of Missouri, 1895, is in conflict with an express statute, namely, Art. I, sec. 10, Constitution United States; Art. II, sec. 15, constitution of Missouri, which said sections provide that no ex post facto law or retrospective legislation shall be passed by the general assembly.

The aforesaid act of the legislature of 1895, having been passed after the arrest and indictment of this appellant, is ex post facto as to this cause and in violation of the clauses referred to of the Federal and State constitutions.

This appellant further states that objection was duly made to the admission of this testimony when first offered in the trial court and afterward in his motions for a new trial and in arrest as appears from the record.

412 Wherefore, this appellant prays that the judgment rendered herein as aforesaid may be set aside and a rehearing granted.

Respectfully submitted.

MARION C. EARLY,
*Attorney for Appellant.*

And afterwards, to wit, on the 30th day of November, 1897, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, RESP.,
*vs.*
GEORGE THOMPSON, APP.

Now at this day, the court having fully considered and understood the motion heretofore filed for rehearing herein, doth order that said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 5th day of January, 1898, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, RESPONDENT,
*vs.*
GEORGE THOMPSON, APPELLANT.

Now at this day there is presented to the honorable Shepard Barclay, chief justice of the supreme court of the State of Missouri, in chambers, a writ of error to the Supreme Court of the United States, a citation directed to said respondent, citing and admonishing him to be and appear at a Supreme Court of the United States on the fourth day of February, 1898, an assignment of errors and a bond in the sum of five hundred dollars, which said writ of error is allowed, said citation signed, and said bond approved, ordered filed, and made a part of the record herein.

Which said assignment of errors is in words and figures viz:

In the Supreme Court of the United States.

STATE OF MISSOURI, RESPONDENT,
*vs.*
GEORGE THOMPSON, APPELLANT.

ASSIGNMENT OF ERRORS.

Comes now George Thompson, the above-named appellant, by his counsel, and moves this court to set aside the judgment rendered by the

honorable supreme court of Missouri in this cause on the 16th
413 day of November, 1897, and to grant him a new trial for the reasons following, to wit:

The court erred in sustaining the trial court in the admission of certain handwritings, as appears from the record on pages 309–319 inclusive, for the purpose of comparison under section 8944a, Session Laws of Missouri, 1895, because in violation of Art. I, sec. 10, Constitution United States, and in violation of Art. II, sec. 15, constitution of the State of Missouri, because the same is ex post facto and void.

Wherefore, appellant prays that the judgment rendered as aforesaid be set aside and a new trial granted.

Respectfully submitted.

MARION C. EARLY,
*Attorney for Appellant.*

Which bond is in words and figures as follows, viz:

Know all men by these presents, that we, Geo. Thompson, as principal, and Byron M. Henderson and William Stewart, as sureties, are held and firmly bound unto the State of Missouri in the full and just sum of five hundred dollars, to be paid to the said State of Missouri, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 5th day of January in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, lately at the October term, A. D. 1897, of the supreme court of Missouri, in a suit depending in said court between The State of Missouri, respondent, and George Thompson, appellant, judgment was rendered against the said George Thompson, appellant, and the said George Thompson having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Missouri, citing and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington, D. C., not exceeding thirty days from the date of the citation in said cause:

414 Now, the condition of the above obligation is such, that if the said George Thompson shall prosecute said writ to effect and answer all damages and costs, if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

GEORGE THOMPSON. [SEAL.]
WM. STEWART. [SEAL.]
BYRON M. HENDERSON. [SEAL.]

Sealed and delivered in presence of—

JANUARY 5TH, 1898.

STATE OF MISSOURI, *ss:*

Approved by Shepard Barclay, chief justice supreme court of Missouri.

UNITED STATES OF AMERICA,
*State of Missouri, City of St. Louis, sct:*

Before me, the undersigned, chief justice of Missouri, personally appeared Byron M. Henderson (of Webster Groves, Mo.), who, upon

oath, states that he is worth over and above all indebtedness the sum of five hundred dollars, and that he owns real property to that amount, subject to execution in the State of Missouri.

BYRON M. HENDERSON.

Subscribed and sworn to before me this 5th day of January, 1898.

SHEPARD BARCLAY,
*Chief Justice of the Supreme Court of Missouri.*

UNITED STATES OF AMERICA,
*State of Missouri, City of St. Louis, set:*

Before me, the undersigned, chief justice of Missouri, personally appeared William Stewart, who, upon oath, states that he is worth over and above all his indebtedness the sum of five hundred dollars, and that he owns real property to that amount, subject to execution in the State of Missouri.

WM. STEWART.

415 Subscribed and sworn to before me this 5th day of January, 1898.

SHEPARD BARCLAY,
*Chief Justice of the Supreme Court of Missouri.*

STATE OF MISSOURI, *set:*

I, John R. Green, clerk of the supreme court of the State of Missouri, certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings had and made in the case of State of Missouri against George Thompson, as fully as the same remain on file and of record in my office.

Witness my hand as such clerk and the seal of said court hereto affixed. Done at the city of Jefferson this 26th day of January, 1898.

[SEAL.] JNO. R. GREEN, *Clerk.*

(Indorsement on cover:) Case No. 16836. Missouri supreme court. Term No. 623. George Thompson, plaintiff in error, vs. The State of Missouri. Filed March 28th, 1898. Office Supreme Court of U. S. Received Mar. 3, 1898.

Signed

No. 623.

Brief of Gov for P. E.

Filed April 29, 1898.

Supreme Court, U. S.
FILED
APR 29 1898
JAMES H. McKENNEY,
CLERK.

IN THE

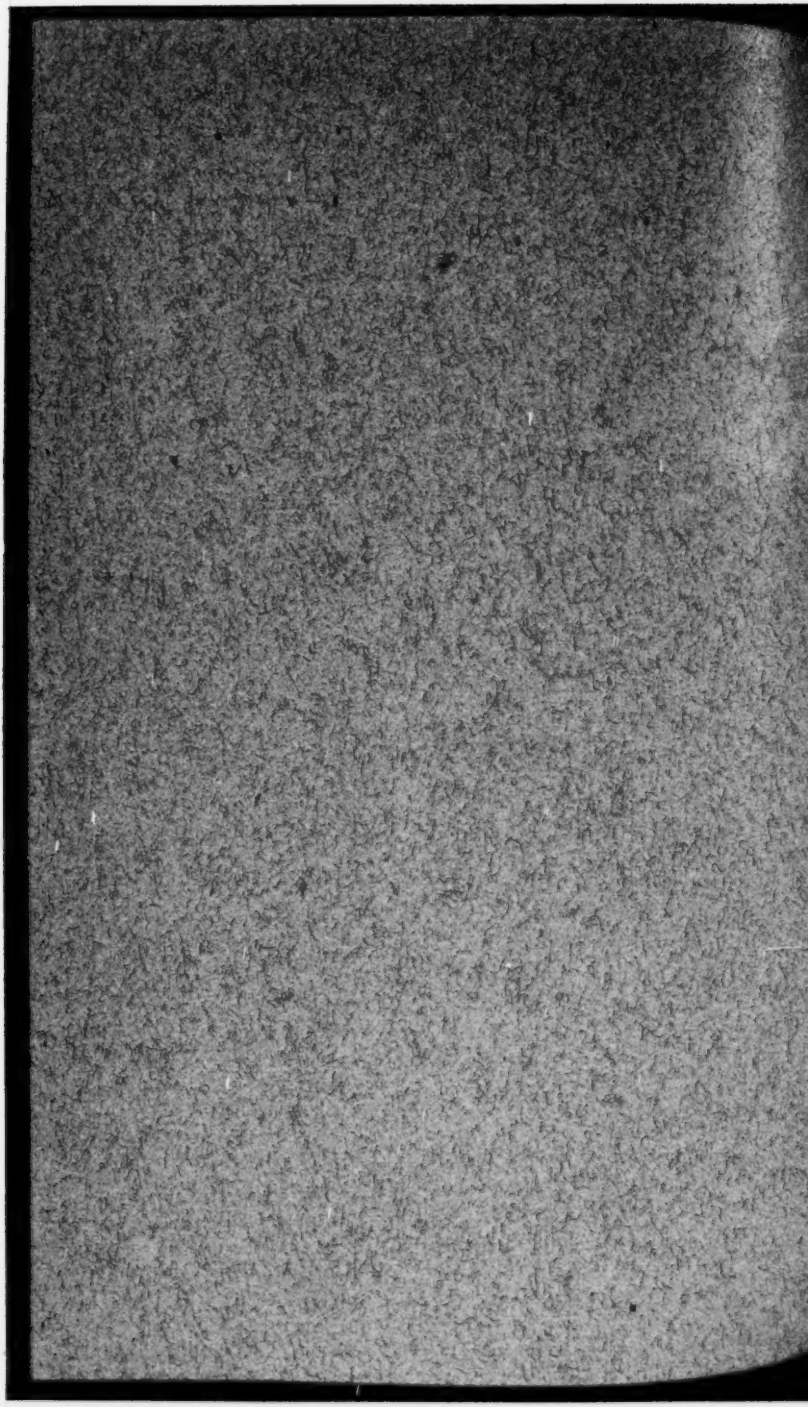
# Supreme Court of the United States.

## OCTOBER TERM, 1897.

| | | |
|---|---|---|
| GEORGE THOMPSON, Plaintiff in Error, vs. THE STATE OF MISSOURI, Defendant in Error. | } | No. 623. |

## Statement and Brief for Plaintiff in Error.

JONES H. PARKER, Printer, 109 N. Fourth St.



IN THE

# Supreme Court of the United States.

## OCTOBER TERM, 1897.

| | | |
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| GEORGE THOMPSON, Plaintiff in Error, vs. THE STATE OF MISSOURI, Defendant in Error. | } | No. 623. |

## Statement and Brief for Plaintiff in Error.

### STATEMENT.

At the November Term, 1894, of the St. Louis Criminal Court, an indictment was returned against defendant, charging him with murder in the first degree It was filed in said Court, November 24, 1894. On December 6, 1894, defendant was arraigned and pleaded not guilty. The cause came on for hearing March 22, 1895, and on March 27th, the jury returned a verdict, finding defendant guilty as

charged. The defendant, after having been sentenced in accordance with said verdict, was granted an appeal to the Supreme Court of Missouri. and on February 4, 1896, the case was reversed and remanded. The cause came on for a second hearing May 25, 1896, and was concluded May 29, and on the same said day a verdict was rendered, finding defendant guilty as charged.

Within four days thereafter defendant filed a motion for a new trial, which said motion was, by the Court, overruled on July 21, at the May Term.

On July 23, defendant filed his motion in arrest, which said motion was by the Court overruled on July 27, and, after defendant had been sentenced in accordance therewith, a second appeal was granted to the Supreme Court of Missouri.

On November 16, 1897, the said Supreme Court rendered an opinion, affirming the judgment of the trial Court, Barclay, C. J., and Sherwood, J., dissenting.

In due time a motion for a rehearing was filed, which said motion was by the Court overruled; and, afterwards, to-wit, on January 5, 1898, a writ of error was granted to this Court.

The attention of this Court is directed to the introduction of certain handwritings in evidence, under an act of the Legislature changing the law upon this subject, passed after the arrest, indictment and first trial of this defendant.

## SUBSTANCE OF EVIDENCE.

The evidence is not here stated, the facts as shown by the record being substantially as follows:

On September 29, 1894, this defendant was arrested on the charge of causing the death of one Joseph Cunningham, by means of strychnine poison, and a conviction is sought upon circumstantial evidence alone. It being essential that the State show that the defendant, or some one for him, had procured or was in possession of the kind of poison alleged to have been administered, and which caused the death of deceased, it was discovered that a quantity of strychnine had been purchased on an order purporting to have been written by a neighboring physician. The druggist who filled the order testified that he knew defendant well, and stated positively that he was not the person who presented the order and obtained the poison thereon. The physician whose name was signed to the order denounced it as a forgery. It was likewise essential in order to secure a conviction, that some motive for the commission of the offense be established on the part of the defendant. Accordingly, an anonymous letter was brought forward, containing an overt threat against the life of deceased, the State claiming that both the papers referred to were written by the same hand. The first

paper being denounced as a forgery, and the second being unsigned, the State attempts to prove that both were written by defendant by means of a comparison with certain extraneous writings, alleged to have been secured from him after his incarceration.

It is admitted that these writings contained nothing whatever against the defendant, or in any wise pertaining to the case. but were sought to be introduced solely for the purpose of comparison with the former writings referred to, to-wit, the forged order for strychnine and the anonymous threatening letter, and by such comparison prove that both were in the handwriting of defendant, thus directly connecting him with the crime with which he stands charged.

At the time of the arrest and first trial of this defendant there was no statute providing for the introduction of such writings for the purposes referred to, and for more than fifty years, the State Supreme Court had followed the common law rule; but, notwithstanding, these writings were, over defendant's objection, admitted for comparison. The case was appealed to the Supreme Court, and because of this error was reversed and remanded.

State vs. Thompson, 132 Mo. 301; 34 S. W. Rep. 31.

Subsequently, the legislature passed an act changing the law upon this subject, which said act is in words and figures as follows: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writing and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of

genuineness or otherwise of the writing in dispute." Sess. laws Mo. 1895, p. 284. Under this act the same writings were allowed to be introduced for the same purpose for which they had been held to be incompetent at the first trial, and presumably so because on the date of the second trial the act legalizing such evidence had gone into effect. This was not any new or different handwriting obtained from the defendant after that act went into effect but was the same old writing which had been declared incompetent. These writings were admitted over defendant's objection, the conviction now complained of resulted, the case was again appealed and affirmed. 42 S. W. Rep. 949.

## ERRORS ASSIGNED.

### I.

It was error to admit in evidence for the purpose of comparison certain extraneous handwritings under the provisions of section 8,944A session laws of Missouri, 1895, because the said act was passed after the arrest, indictment and trial of defendant and is in violation of Art. 1, Sec 10, Constitution United States.

Calder vs. Bull. 3 Dall., 386;
Kring vs. Missouri, 107 U. S., 221;
State vs. Bond, 4 Jones (N. C.), 4;
State vs. Johnson, 12 Minn., 386;
Story on the Constitution, Sec. 1,345;
Cooley Const. Lim., pp. 319-325;
1 Blackstone, Sec. 45-46;
Kent's Commentaries, p. 458;
Miller on the Constitution, p. 587;
Hare's Am. Const. Law, p. 565;
Black on Const. Prohibitions, Sec. 234 et seq.

### II.

It was error to admit in evidence for the purpose of comparison certain extraneous handwritings under section 8,944A session laws of Missouri, 1895, be-

cause in violation of Art. II, Sec. 15, Constitution of Missouri, and in violation of sections 6594, 6597, 6598, Revised Statutes of Missuori, 1889.

State vs. Thompson, 42 S. W. Rep. (Mo.), p. 953;
Pacific R. R. Co. vs. Cass Co., 53 Mo., 17;
City of St. Louis vs. Life Ass'n., 53 Mo., 466;
State vs. Grant, 79 Mo., 113.

## ARGUMENT.

It is contended that the admission of certain extraneous handwriting, under Sec. 8944a. laws of 1895, for the purpose of forming a standard of comparison, and by this means to directly connect the defendant with the crime with which he stands charged, thus rendering a conviction possible, is obnoxious to the constitutional inhibition upon ex post facto laws, and likewise in contravention of the constitution and laws of the State of Missouri, which not only prohibit the passage of ex post facto laws, but of all retrospective legislation. The law ascribes no probative force to any particular testimony offered in a criminal proceeding, the whole testimony being submitted to the jury for its consideration upon proper instructions by the Court. There is, however, cast upon the State the burden of proving the guilt of the accused beyond a reasonable doubt, and if, after the close of it's testimony, it has failed to so establish any material point, it is the duty of the Court to give to the jury a peremptory instruction to acquit the defendant. In this case it is not possible to secure a conviction of the defendant, unless the State is able to connect him in some way with the offense with which he stands charged, and to offer testimony showing a motive for its commission. It is by the admission of

this testimony that the State is enabled to establish these essential elements, and, indeed, it is not necessary to discuss at length the materiality of this testimony, as it has been declared by Division No. 2 of the Supreme Court of Missouri to be so material as to warrant a reversal of the judgment of the lower Court.

State vs. Thompson, 132 Mo. 301.

The question before this Court is, whether testimony declared inadmissible upon the first trial of this cause is properly admitted at a later trial, because of the passage of a statute in the meanwhile, rendering such testimony legal and competent.

Laws 1895, p. 284.

The act does not purport to apply to then pending causes, or to alter or change any of the sections of the statutes cited, and which still remain in force. Yet the trial Court, under it's provisions, admitted in evidence the same writings which had been declared inadmissible upon the first trial. The admission of the evidence, under the act referred to, we believe to be clearly in violation of the provisions of our Federal Constitution, which provides that no ex post facto law shall be passed, and also in violation of the constitution and laws of Missouri, which provide not only against the passage of ex post facto laws, but against all retrospective legislation. Mr. Justice Miller, in Kring vs. Missouri, supra, says: "Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commmission of the offense, in order to convict the offender, or which renders a

conviction easier, is ex post facto and, therefore, void."

Now, the writings in question were never evidence until the state could prove that the same were in the handwriting of the defendant. That is to say, they were never evidence until proved to be genuine, and the proof of their genuineness is the basis of their admission. Unproved, it is the same as though they had never existed. Hence, it is not changing the means of proving that which was already evidence because this was never legal and competent evidence. Unless the state is able to establish by legal and competent evidence that the alleged order for strychnine and anomynous threatening letter were written by the defendant the same are not and cannot be any evidence whatever against him. It is conceded that under our law at the time of the first trial of this defendant extraneous writings, not in evidence for any other purpose and not admitted to be genuine, could not be introduced for the purpose of comparison only. So under our laws now, hearsay evidence is not admissible, yet if the legislature is empowered to alter the legal rules of evidence with respect to the introduction of handwritings and render that legal and competent which before was illegal and incompetent, why may it not also remove the reasons for the exclusion of hearsay and by such means secure the conviction of any one charged with the commission of a crime? Hearsay is also evidence, but it is excluded for certain reasons; so at the time of the first trial of this defendant extraneous writings were evidence but excluded for certain reasons; hence, neither were legal and competent evidence and, therefore, the same as though they had never

existed. Under our constitution, when an offense is commtited, if there be any rule, however technical, which can by possibility avail the accused, he must retain it to the end and the stumbling block cannot be removed by legislation. Nor has a legislature authority to alter and change laws relating to procedure in its broader sense, because the term procedure may embrace the whole system of pleading, practice and evidence and when we say that the legislature is empowered to alter rules of procedure, we only mean that it has power to alter such matters of procedure as will not prejudice any substantial rights of the accused. Mr. Justice Harlan in Hopt vs. Utah, (110 U. S. 574,) follows all the authorities with respect to the true meaning of ex post facto law as contained in our constitution, holding that the ban may be removed from a certain class of persons as witnesses so long as the rules of evidence, that is to say, rules which relate to the component parts of the evidence as such, are not altered and the situation of the accused changed to his disadvantage. It will be observed that the rule in this case relates solely to the restrictions placed upon a certain class of persons, and not to the evidence itself or a past offense.

In State vs. Johnson, 12 Minn., 378, the court holds that the admission of indirect evidence, is, as to offenses alleged to have been committed prior to the time of its passage ex post facto and void.

In conclusion, if a person be charged with the commission of an offense, which can only be proved by testimony of a particular kind or grade, and afterwards a law abolishing the reasons for the exclusion of that testimony is passed, and that which was theretofore illegal and incompetent testimony is rendered

legal and competent testimony, surely the accused would be just as liable to be unjustly punished as he would be under either of the other meanings of ex post facto law. Had it not been for the prejudicial error thus committed the defendant could not have been convicted.

Respectfully submitted,

MARION C. EARLY,

Attorney for Plaintiff in Error.

Chas F Jory
atty for Pltff in

—IN THE—

# SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1897.

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STATE OF MISSOURI, DEFENDANT IN ERROR.

VS.

GEORGE THOMPSON, PLAINTIFF IN ERROR.

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## STATEMENT.

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At the October term, 1894, of the St. Louis Criminal Court, defendant was indicted for the murder in the first degree of J. M. Cunningham, sexton of St. Peter's Episcopal church in the city of St. Louis. He was charged with administering strychnine in cheese to said Cunningham. Cunningham was a man 32 years old, in good health, and was sexton of St. Peter's church, which was located on the corner of Lindell and Spring avenues, St. Louis. He had been sexton since Christmas, 1893. Prior to his employment, the defendant, George Thompson, was sexton of said church. After deceased took charge of the church the defendant sometimes assisted him in his duties. The deceased was married and lived at Clayton, St. Louis county. During the week of his death the deceased brought some mushrooms to a Mrs. McLean, who lived in the city. On Saturday morning, September 29, he left his home at Clayton well and hearty. On this date F. S. Beckett was

the organist of St. Peter's church in St. Louis. On September 29, 1894, Beckett, as organist, went to St. Peter's church to practice for the next day's service, reaching the church at two o'clock p. m. Cunningham, the sexton, was then working on the lawn. Beckett, the organist, went into the church, remained a few minutes, then left and made two or three calls and returned about four o'clock p. m. and began to practice. Cunningham, the deceased, was still sprinkling the lawn. Twenty or thirty minutes after the return of Beckett to the church the deceased told him he had a lunch, and asked if he would help eat it. He said he would, and deceased said he would go into the church and spread it out. When the deceased came in from the lawn he called the organist, and together they went to the cellar of the church. In the lunch was a bottle of beer and a glass. Deceased poured Beckett a glass of beer, and Beckett drank it, and they both ate cheese and crackers, and the organist ate a charlotte russe and a pear. The deceased sexton ate heartily of the cheese and crackers. The organist ate only a small portion of the cheese and crackers, as compared with the amount deceased ate.

The organist said the cheese tasted bitter, and the deceased sexton remarked that it was bitter. The organist did not feel any bad effect until he went upstairs. Beckett left deceased before the latter had finished eating. Beckett testified: "I went up and I felt rather sick at first, dizzy, as I was practicing the organ, but I thought it would work off, and then I had cramps and a sort of stiffening. Then I tried to walk out and at first I could not walk at all, and then I relaxed; I went out all right and then I had pains in the back, and lockjaw, and something of that kind all the time. The deceased came back as I was practicing the organ and said there must have been something the matter with that cheese or the lunch. He said he felt quite sick. We compared notes and found that we both felt the same."

The organist Beckett then started after the doctor, or something, and testified: "And I had trouble in getting out; I could not." Deceased said he had a great many pains. We both called for somebody and some man ran up. The deceased called for help repeatedly. In a few minutes Dr. Love came, and during these few minutes the deceased, Cunningham, at first had convulsions, and then he got perfectly quiet after that and didn't move a muscle. The physician administered antidotes to witness. The witness, Beckett, identified the basket and the articles of glassware that the lunch came in.

Beckett also testified that deceased drank a glass of beer. Beckett also testified that he discovered no bad taste about any of the lunch but the cheese.

Peter Waitz testified he worked at 3700 Lindell avenue. That right across from where he worked was St. Peter's church. Witness worked for Mr. Mansur; witness knew the defendant; defendant had been sexton of St. Peter's church when it was on Grand avenue; witness knew the deceased; had known deceased eight years. On evening of September 29, 1894, witness saw defendant and deceased about 2:15 or 2:30 p. m. standing on the wood-work that goes in the back of the church talking to each other; they were just the width of the street from witness; deceased had been washing the sidewalk and was dressed in his working clothes; defendant had on a blue working jacket and a white straw hat; about 4 o'clock the same afternoon witness heard the cry for help from the church and then heard it repeated; witness went over to the church and was the first person that reached deceased; he found deceased already speechless and dying, and Beckett, the organist, unable to speak.

Witness identified the basket and glasses, and testified that the bottle had Anheuser-Busch trade mark on it.

Hiram Stemberg, testified he knew defendant. Defendant had been sexton of St. Peter's church, and witness was a member of the choir until Easter, 1894. Defendant ceased to be sexton about the first of 1894. Sometime in February, 1894, defendant met witness near the old church on Grand avenue and Olive street, right across from Beers' hotel. They spoke and defendant had a bottle that he offered to the witness to give to Cunningham. Defendant said it was blackberry brandy and whisky. Defendant said deceased gave him, defendant, a mixture of that kind, and it made him drunk, and that caused him to lose his place as sexton. Witness took the bottle. It contained a liquid. Witness told defendant he would take it. Witness went back of the church and broke the bottle on a rock. This was Sunday night. The next Wednesday night after the rehearsal he met defendant again across the street from the church. He called to witness and asked him if he gave Cunningham the bottle, and witness told him yes; that defendant then called witness a liar, and said: "If you had given him that bottle to drink, but I know you did not, he would be drunk for a week." About the time defendant gave witness the bottle, defendant was working at Mrs. Gordon's on Westminster Place, and he said he was also doing chores for the Rev. Dr. Short. He made the fires in the furnace and blacked Dr. Short's shoes.

Sarah Dito testified she was a domestic servant in the employ of Mr. Thos. McLean, 3708 Pine St. At the time of the poisoning of Cunningham, defendant was employed by Mr. McLean and Rev. Dr. Short, rector of St. Peter's church, to do the yard work. Witness

testified that on Tuesday, about two weeks before the poisoning of deceased, defendant brought a basket of mush-rooms to Mrs. McLean, and on Tuesday before his death deceased also brought some mush-rooms to Mrs. McLean. Mrs. McLean was absent, but deceased left them for her. The defendant was sitting in the laundry where witness was ironing, and saw the mush-rooms, and deceased asked defendant if Dr. Short liked mush-rooms, and defendant said he did not know.

George Davis, coachman for Mr. A. Cole, testified that he knew defendant. That in July previous to the poisoning the defendant came to where witness was scrubbing the sidewalk. Witness was deeply interested in the welfare of one Duncan, and witness gave defendant a newspaper and said, "Look over the paper and see how Davis stands." Defendant read the paper, and after he got through, he said, "I have been down town today on a little errand, and I got defeated in what I was going to do." When asked how, defendant said, "I went down to the drug store; aimed to get some strychnine." Defendant then said, "You are well acquainted down there; couldn't you do that for me?" Witness said no. Witness also stated to defendant that defendant had better let that alone; that defendant would get himself into trouble. Witness then asked defendant what he wanted with the strychnine, and defendant said he was going to poison a dog. The defendant said the dog had bit some little girls where he worked, and he wanted to poison the dog and not let the boss know how it got killed, and if it died around the house he would not know anything about it. Defendant said he was working either at McLean's or Dr. Short's, but witness could not remember which. About a week before this defendant told witness that he, the defendant, had been beaten out of his job, and did not like it. On the evening of the poisoning witness met defendant near six o'clock, and stopped him and said, "That is too bad; two gentlemen were poisoned at the church, and one was dead and the other nearly so." The defendant merely answered yes, and walked on. Usually defendant had stopped and talked to witness.

Dr. C. A. Frank testified that the death of deceased was caused by poison; that witness took out the stomach, liver, brain and kidneys, placed them in hermetically sealed jar, and turned them over to the coroner.

I. N. Love testified he turned over the hermetically sealed jar, together with peace of cheese received by him from the police department, to C. R. Sanger, professor of chemistry of Washington University.

Prof. Sanger testified to receiving the jar and contents. The professor subjected the cheese and the contents of the stomach to five

different tests during a period of three weeks, and discovered in the piece of cheese, weighing five-sixths of an ounce, a proportion of three-tenths of a grain of strychnine to the ounce. The chemist's analysis revealed strychnine in sufficient quantity in the stomach of deceased to account for death by that poison.

Dr. I. N. Love testified that all indications in Beckett's, the organist, case, pointed to strychnine poison. Witness had not a shadow of a doubt on that subject. Witness also testified to seeing a basket and the remains of a lunch there, and that he directed some one to take charge of it and turn it over to the police.

John Berry, a policeman, testified that St. Peter's church was on his beat; that he went to the church about 5 o'clock the evening of the poisoning; that witness gathered up the fragments of the lunch and basket and bottle and brought them to the police office of the Fifth district. Witness identified the articles in evidence as the same ones.

E. Schmidt, a grocer at No. 3562 Olive St., testified that his store was two blocks from St. Peter's church; that he knew Dr. Short, rector of the church, and remembered the occurrence of the poisoning. Witness had known defendant two or three years at that time. About noon of the day deceased was poisoned defendant came to witness' store and asked the price of a bottle of beer. Defendant said he needed only a single bottle. Witness told defendant the price was ten cents a bottle, or three for a quarter. Defendant left for a little while. Defendant studied about it a while and came back in a few minutes and said he, the defendant, wanted a bottle of beer. Witness asked him what kind. Defendant said the same kind that Mrs. Rev. Dr. Short gets. Witness told defendant that he did not know what kind Mrs. Short had been getting. Defendant said she got her beer at this store. Witness told defendant she had not been trading there, and hence witness did not know what kind defendant wanted. Defendant then said Anheuser-Busch. The grocer gave him a pint bottle of dark Anheuser-Busch beer, and defendant handed him a quarter and witness gave defendant fifteen cents in change and defendant went out. Defendant appeared to be excited or confused; did not seem to know what he wanted to say. Witness identified the bottle in evidence as the kind of bottle witness sold defendant, but said the bottle he sold him had a rubber cork when witness sold it to defendant. Witness identified the prisoner as the purchaser of the beer beyond any question.

Lee Ruchersfelt testified he was a druggist at No. 3695 Laclede avenue, two blocks from St. Peter's church. That on the 26th of Sep-

tember, 1894, three days before the poisoning, witness received a written order purporting to come for Dr. Keber, for a drachm of sulphate of strychnine; the order was brought by a negro man; witness could not say that he had ever seen the negro since; witness believed the order to be genuine and he gave the negro the drachm of strychnine for Dr. Keber; there were 45 or 50 fatal doses in the amount the negro purchased; witness testified he did not know Dr. Keber personally, but knew there was such a physician on Pine street; witness marked the order "9 | 26 | 94," and signed his own name thereon; witness delivered this order to Mr. Gocking, a detective, the Monday following the poisoning. This witness identified paper offered in evidence as the order presented to him, and on which he sold the strychnine to the negro who came for it.

Dr. Keber testified he had resided at No. 3832 Pine street, seven years. He pronounced the order a forgery of his name. He never gave it or authorized it. He had no negro man in his service. Witness did not know defendant Thompson.

Nettie Simon testified that she worked at Grand Avenue Bakery on Grand avenue and Olive street. That witness remembered the poisoning of Mr. Cunningham, the sexton; heard of it the day it happened. About noon of that day, Saturday, she sold two charlotte russe to a negro man. The negro man threw down a dime and went out in a hurry. Witness sold a dozen charlotte russe to a lady that afternoon about 5 o'clock, and that was all she sold that day of charlotte russe. Witness identified the paper in the basket as of the kind in which she put up the charlotte russe she sold to the negro man, and the box.

Joseph Gocking, special police officer, testified he was detailed on this case about 6:30 the evening of the poisoning with Officer Harrington. They received the basket and remnants of the lunch that evening and locked them up, and they have remained locked up ever since, except a part of the cheese furnished Prof. Sanger for analysis. Witness found a paper and a piece of charlotte russe sticking to it in the furnace in the basement of the church. Witness arrested defendant. Defendant said that night he was arrested he had not bought any crackers or beer. Next day defendant admitted he had, but gave them to a friend that was going away. Witness identified the letters marked "B" and "C" and the order on Ruchersfelt. Witness also identified a blue jumper shirt and a hat, which was found and took in the basement of Dr. Short's residence. Witness said defendant told him where he could find it.

Michael O'Malley testified he was a member and a captain in the police force of St. Louis, and had been for twenty years; was captain in the Fifth District in September, 1894; St. Peter's church was in his district. Witness saw defendant write a letter to Mr. Beckett, the organist. The letter witness mentions is known in the record as Exhibit "E," and the envelope as Exhibit "F." Witness also saw defendant write a note, marked and known in the record as Exhibit "G," to Rev. Dr. Short; also one to Charity Thomson, 3718 Morgan street. This latter letter was marked Exhibit "I" and the envelope "H," and so known in the record. Witness had a conversation with defendant, in which he denied being around St. Peter's church the day of the poisoning, but finally said he, defendant, saw Cunningham about 4:30 sprinkling the lawn. The prisoner denied in toto the story about his being present at McLean's when deceased brought her some mushrooms. Defendant said he didn't know what mushrooms were and never saw any.

Upon cross-examination, this witness, O'Malley, stated that when he learned of the anonymous letter written Cunningham he said I will go and get his hand-writing, so as to compare it with this letter; and witness took the defendant some paper and told defendant to write a letter. Defendant said he wrote one to Dr. Short. Witness asked defendant who he wanted to write to. Defendant said to Dr. Short and to his wife, and witness gave defendant paper and defendant wrote these letters. Witness stated that he went to get defendant's handwriting to compare with the anonymous letter. The superscription on the envelope to Mr. Beckett was in these words, Exhibit "E":

"Mr. Beckett,
"Organist,"
"St. Peter's Church,
"Lindell & Spring Ave."

The letter to Mr. Beckett, excepting the printing, was in these words:

(Exhibit "F.")

"Office of Police District,
"St. Louis, Oct. 1st, 1894.

"Mr. Beckett me dear sir i know of no one having no ill feeling towards you or mr. cunningham nor I dont know anything about the basket an I dont know who brought the basket to the church.

(Signed) GEO. THOMPSON."

The letter to Dr. Short, Exhibit "G," was in pencil, as follows:

"Dr dear sir will you come to see me at once as i am anxious to see you.

Your obedient servant,
GEO. THOMPSON."

Addressed, "Rev. Wm. Short,
3694 West Pine St."

The letter directed to Charity Thompson, exhibits "H" and "I," was directed:

"Charity Thompson,
3718 Morgan St.,
City."

And in these words:

"Oct. 1st, 1894.

Charity i hope you are doing well you may come to see me at once if you like to an thinks it not too early for you to come out i wants to see you verry bad i wants to see you mr. whitiour and edd goodloe at once edd hawkins also charlie and mr. woods you may bring me something to eat if you like to they are not starving me to death out here.

GEORGE THOMPSON."

"Charity dear wife. i i hope you are getting well. i also hope you are not in grief. mr short will come to see me at once i hope, i hope baby is well an not so fretful as has ben i were so afraid you would try to come to see me today an make yourself sick remember me in Prayer for my trust is in the Lord. Mr. and Mrs. rev Short has ben to see you i guess and so has mrs mclean never did I think that i would come to be locked in Prison but i am inocent an tries to make myself satisfied good by Georg Thompson Charity Thompson, 3718 Morgan."

Exhibit "A" was in these words:

"Please send by bearer 1 ʒ (1 dram) of strychnine, and oblige,

"Dr. Kebber, 3832 Pine St."

Exhibit "B" was in these words:

"Beckard, Choir Master, St. Peter's church, Lindell and Spring ave." Postmarked, "St. Louis, Aug. 2, 11 p. m., '94."

Exhibit "C" was as follows:

"Aug. 2nd, 1894.

My dear Beckard i am sorry o sorry indeed to say to you that the music commite is so dissatisfied with you undertaking to play their grand new organ as they call it as a friend to you i must say that there will most certainly be a change made some are saying you knows nothing about playing an organ while a balance says you can't even play a piana i felt so bad over this felt it my duty to give you an understanding of what they are going to do now i must say to you of that i know you have a finer choir in st peters church now than ever she were known to have i have heard men who know all about music say that they would not wish a better organist and the training of your choir

they have have said to me were magnificent Beckard you are not an organ maker to suit evy ones preferance to to the sound of the organ so if i were you i would let them persue their coarse for all you may do now will be counted nothing i have worried with this committee time anagain asking them to be contented saying saying to them that we can not get a more faithful worker than you are their reply were you know nothing some replied you knew too much about music and not enough about farming some saying they had heard enough of your smart talk the first beginning of all this rumor came from that low irish Joe the sexton there of the church 3 or 4 of the gentlemen of the music committee came in the church quite a good while ago. or asked had or did you do any practiceing so he spoke up an said you were tramping around in the church the best part of your time an one half of your time you had someone to teach you how to play the organ an it soon reached the committee an from one word to another they said Joe were about right an were sensible to notice such a thing an not long since he told some one of the vestry agretdeal you should said about no one in st peters church should not impose on you an you did not care whether you played the organ right or wrong for you got no credit either way thought the transactions of our business i have found that Joe both a tadling liear an hypocrit will have a good talk with you after the next meeting will also come verry near getting rid of mr Joe should be attending to the cleaning of the church and the yard it would not look so much like a pastor for cattle or some place for rent instead of seeing after your business Yours Resp will not give name but will see farther i will make efford to get rid of mr. Joe for his interfering."

W. L. Fitzgerald, then qualified as an expert on handwriting, and shown all of said exhibits and requested to compare exhibits "B" and "C" above with exhibits "F," "G," "H" and "I," and to state if they were in the same handwriting. He gave his opinion that they were. Exhibit "A" with exhibit "G," and he testified that they were written by the same party.

Thereupon the State offered all of said exhibits, letters, envelopes and notes in evidence, to the introduction of which, in evidence, the defendant, by his counsel, objected; first, because the inclosure shows that exhibits "E," "F," "G," "H" and "I" were obtained by fraud and deceit after the defendant had been arrested and incarcerated, and were obtained for the purpose of showing them in evidence against the defendant, and for the purpose of compelling him to manufacture evidence against himself; second, that they were objected to because the exhibits "E," "F," "G," "H" and "I" are not in any way connected with the case, but are wholly irrelevant writings attempted to

be introduced for the purpose of comparison. There being no statute in this State providing for the admission of handwriting for the purpose of comparison, the Supreme Court has uniformly followed the rule of common law, the general rule of which is that handwritings are inadmissible for the purpose of comparison, this general rule admitting of two exceptions, viz.: writings already in the case for some other purpose than that of comparison, and when the party it estopped to deny their genuineness or admit their genuineness in open court.

Which objection the Court overruled and admitted all of said exhibits in connection with the evidence of said Fitzgerald; to which ruling defendant at the time, by counsel, duly excepted.

Rev. Dr. Short testified defendant's reputation was good prior to this charge. Witness corroberated the other witnesses as to the blue jacket of defendant found at his house, the identification of the dishes and to requesting the officers to preserve the remnants of the lunch; witness also testified that Mrs. McLean was a member of his church, and that defendant was discharged because the vestry preferred a white man for sexten when they moved to the new church and Cunningham took defendant's place.

Miss Susan Knox Gordon testified the defendant's general reputation was good for two years before she employed him at her residence in February, 1894.

Thomas H. Smith, formerly choir master of St. Peter's church, testified to the good character of defendant.

P. B. Pitman, barber, at 3406 Olive St., testified to good character of defendant and bad reputation of Davis, witness for the State.

Charles Thompson, waiter at West End Hotel, cousin of defendant, likewise testified to good reputation of defendant and bad reputation of witness George Davis.

Defendant testified that he lived at 3718 Morgan, and on the morning of September 29, 1894, he left his home about 6 o'clock and went to the residence of Rev. Dr. Wm. Short, rector of St. Peter's church; that he, the defendant, remained there until 8:30 that morning; from Dr. Short's defendant testified he went directly to the residence of Mrs. Thomas McLean and remained there at work until a quarter past twelve. That he went home to lunch and returned to Dr. Short's about 2 or 2:15 p. m. and was at Dr. Short's continuously until a quarter to five o'clock that evening. That in going home for lunch he, defendant, past St. Peter's church going on Spring Avenue, and going back he also passed the church.

This cause was submitted at the March term, 1895, of the Criminal

Court of the city of St. Louis, and on March 27, 1895, the jury returned a verdict, finding defendant guilty of murder in the first degree.

Defendant being duly sentenced in accord with such verdict, was in proper time and manner granted an appeal to the Supreme Court of Missouri, and on February 4, 1896, the case was reversed and remanded for the error of the trial court committed in admitting the letters written by defendant while in jail to his wife, the organist and Rev. Dr. Short, as they were offered for the sole pupose of furnishing specimens of defendant's handwriting, and thus furnishing a basis for comparison thereof with the order for the poison and the threats against the deceased sexton.

Between the date of the trial, the 22nd of March, 1895, and the decision of the case on the 4th day of February, 1896, the Legislature of Missouri added a new section to chapter 173 of the Revised Statutes of 1889, to be known as section 8944*a*, which will be found on page 284, Session Acts of Missouri for year 1895, and which section is as follows:

Section 1. A new section is hereby added to chapter 173, R. S. 1889, of this State to be numbered as section 8944*a*, and to read as follows:

Section 8944*a*. Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute.

This law became operative under the Constitution of Missouri in July, 1895. The case came on for the second hearing May 25, 1896, and was concluded May 29, 1896, and on the said May 29, 1896, a verdict was rendered finding defendant guilty as charged. Under the provisions of this statute passed in 1895, and operative at the time of the second trial, the trial court admitted the letters written by defendant above mentioned, and admitted them for the purpose of furnishing specimens of defendant's handwriting, and thus furnishing a basis for comparison thereof with the order for the poison, and the threats against the sexton.

Within four days after said verdict defendant filed a motion for a new trial, which was on July 21st, it yet being the May term of said court, overruled, and on July 23, 1896, defendant filed his motion in arrest of judgment, which was by the Court overruled on July 27th, and after sentence had been passed, a second appeal was granted to the Supreme Court of Missouri. On November 16, 1897, the Supreme

Court rendered an opinion affirming the judgment of the trial court, Chief Justice Barclay and Judge Sherwood dissenting.

In due time and in the proper manner a motion for a rehearing was filed, which motion was by the Court overruled. And afterwards, on January 5, 1898, a writ of error was granted to this Court.

It was conceded in the argument of this case that if the act of 1895 (see session laws of Missouri, 1895, p. 284), is constitutional and applies to this case which was pending at the time the law was passed, no error occurred in admitting the letters; but counsel for defendant earnestly contends that if this act is to be construed so as to admit this evidence in this case it is unconstitutional, because it is a violation of article I, section 10 of the Constitution of the United States, and article II, section 15 of the Constitution of Missouri, of 1875, which forbid the passage of an *ex post facto* law.

The defendant assigns as error, first, the admissions in evidence for the purpose of comparison certain extraneous handwritings under the provision of section 8944*a*, session laws of Missouri, 1895, because the said act was passed after the arrest, indictment and trial of defendant and is in violation of article I, section 10 of the Constitution of the United States; second, that it was error to admit in evidence for the purpose of comparison certain extraneous handwritings under section 8944*a*, session laws of Missouri, 1895, because the same was in violation of article II, section 15, Constitution of Missouri, and in violation of sections 6954, 6957 and 6958, R. S. Mo., 1889.

These are the two propositions that are submitted to this Court for consideration.

# BRIEF.

The law of 1895, (see Acts of Mo. of 1895, p. 284) making the notes written by defendant while in jail and proved to be genuine and competent for the purpose of comparison with the disputed writing, to wit: The forged order to the druggist for strychnine, is not an *ex post facto* law in its relation to this case.

State vs. Thompson, 42 Southwestern Reporter, p. 949.

Hopt vs. Utah, 110 U. S. Rep. 574.

O'Bryan vs. Allen et al., 108 Mo. 227.

State vs. Jackson, 80 Mo. 175.

Cooley on Constitutional Limitations, 3 Ed., 367.

Hope Mutual Ins. Co. vs. Flynn, 38 Mo. 483.

The common law rule was in force in Missouri prior to the enactment of the statute of 1895, relative to comparison of handwritings, announcing the principle that writings were not admissible for comparison with a disputed writing, unless they were in evidence and admitted to be genuine or the party was estopped to deny their genuineness.

State vs. Thompson, 132 Mo. 301.

The order to the druggist was, however, always competent evidence against the defendant, *provided* it was proved *to be genuine* and his handwriting.

The order was already evidence whenever it was shown to be in the handwriting of the defendant, even before the law of 1895 was passed.

The only thing the law of 1895 did was to provide an additional method by which it might be shown that the order was written by the defendant.

The notes offered in evidence for the purpose of comparison were simply permitted as evidence before the jury.

The similarity of the disputed order to the druggist and the right to attack these notes themselves is open to the defendant and his counsel.

These notes were offered solely as a means of arriving at an ultimate fact.

This law of 1895 relates solely to the procedure, and the rule is that remedies and procedure must always be under the control of the Legislature.

Cooley on Constitutional Limitations (5 Ed.), p. 329.

In 110 U. S. Rep., p. 574, the question arose in this way: By the laws of Utah persons, against whom judgment had been rendered upon conviction of felony, unless pardoned by the Governor or such judgment had been reversed on appeal, should not be witnesses. Compiled Laws of Utah (1876) Sec. 378, p. 506.

After the date of the alleged homicide, but prior to the time the defendant was put upon trial, an act of the Legislature was passed which repealed said section 378 and made such convicted persons competent witnesses.

One Emerson, convicted of a felony theretofore, was offered as a witness against Hopt, and defendant objected to his competency, and the objection was overruled.

On appeal to this Court it was held that no constitutional right of defendant was invaded by this statute, and that it was not "*ex post facto*" in its application to the prosecution of the defendant.

It is difficult to understand how opening new sources of light or increasing the means of proving or detecting crime can be said to require less evidence or become *ex post facto*.

Laws which change the rules of evidence relate to the remedy only, and may be applied to existing causes of action without infringing the constitutional guarantees against "*ex post facto*" legislation.

O'Bryan vs. Allen, 108 Mo. 227.

Laughlin vs. Commonwealth, 13 Bush. 261.

Munnier vs. McCray, 113 Mo. 382.

Mrous vs. State (Texas), 21 Southwestern Reporter, 764.

The Court has said: "Alterations, which do not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to guilt, but leaving untouched the nature of the crime, and the amount or degree of the proof essential to conviction, only remove existing restrictions upon certain classes of persons as witnesses,

relate to modes of procedure only, in which no one can be said to have a vested right and which the State, upon grounds of public policy may regulate at pleasure.

"Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged."

Hopt vs. Utah, 110 U. S. 574.

Defendant has been twice tried and twice found guilty by a jury, of murder by poison, and we insist that in his trials no constitutional right of his has been in any way invaded, but he has a trial by the forms of law constitutionally administered, by an impartial court, and this is all any one can legally have.

EDWARD C. CROW, ATT'Y-GENL,
For Respondent.

# THOMPSON *v.* MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 628. Submitted April 21, 1898. — Decided May 31, 1898.

The act of the legislature of Missouri of April 8, 1895, Missouri Laws 1895, page 284, providing that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute," is not *ex post facto*, under the Constitution of the United States, when applied to prosecutions for crimes committed prior to its passage.

THE case is stated in the opinion.

*Mr. Charles F. Joy* and *Mr. Marion C. Early* for plaintiff in error.

*Mr. Edward C. Crow* for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The record suggests many questions of law, but the only one that may be considered by this court is whether the proceedings against the plaintiff in error were consistent with the provision in the Constitution of the United States forbidding the States from passing *ex post facto* laws.

Thompson was indicted in the St. Louis Criminal Court at its November term 1894 for the murder, in the first degree, of one Joseph M. Cunningham, a sexton at one of the churches in the city of St. Louis. Having been tried and convicted of the offence charged, he prosecuted an appeal to the Supreme Court of Missouri, and by that court the judgment was reversed and a new trial was ordered. *State* v. *Thompson*, 132 Missouri, 301. At the second trial the accused was again convicted; and a new trial having been denied, he prosecuted another appeal to the Supreme Court of the State. That court affirmed the last judgment, and the present appeal

brings that judgment before us for reëxamination. *State* v. *Thompson*, 42 S. W. Rep. (Missouri) 949.

The evidence against the accused was entirely circumstantial in its nature. One of the issues of fact was as to the authorship of a certain prescription for strychnine, and of a certain letter addressed to the organist of the church containing threatening language about the sexton. The theory of the prosecution was that the accused had obtained the strychnine specified in the prescription and put it into food that he delivered or caused to be delivered to the deceased with intent to destroy his life. The accused denied that he wrote either the prescription or the letter to the organist, or that he had any connection with either of those writings. At the first trial certain letters written by him to his wife were admitted in evidence for the purpose of comparing them with the writing in the prescription and with the letter to the organist. The Supreme Court of the State, upon the first appeal, held that it was error to admit in evidence for purposes of comparison the letters written by Thompson to his wife, and for that error the first judgment was reversed and a new trial ordered. 132 Missouri, 301, 324.

Subsequently, the general assembly of Missouri passed an act which became operative in July, 1895, providing that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." Laws Missouri, April 8, 1895, p. 284.

This statute is in the very words of section 27 of the English Common Law Procedure Act of 1854, 17 & 18 Vict. c. 125. And by the 28 Vict. c. 18, §§ 1, 8, the provisions of that act were extended to criminal cases.

At the second trial, which occurred in 1896, the letters written by the accused to his wife were again admitted in evidence, over his objection, for the purpose of comparing them with the order for strychnine and the letter to the

organist. This action of the trial court was based upon the above statute of 1895.

The contention of the accused is that as the letters to his wife were not, *at the time of the commission of the alleged offence*, admissible in evidence for the purpose of comparing them with other writings charged to be in his handwriting, the subsequent statute of Missouri changing this rule of evidence was *ex post facto* when applied to his case.

It is not to be denied that the position of the accused finds apparent support in the general language used in some opinions.

Mr. Justice Chase, in his classification of *ex post facto* laws in *Calder* v. *Bull*, 3 Dall. 386, 390, includes "every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender."

In *Kring* v. *Missouri*, 107 U. S. 221, 228, 232, 235, the question arose as to the validity of a statute of Missouri under which the accused was found guilty of the crime of murder in the first degree and sentenced to be hung. That case was tried several times, and was three times in the Supreme Court of the State. At the trial immediately preceding the last one Kring was allowed to plead guilty of murder in the second degree. The plea was accepted, and he was sentenced to imprisonment in the penitentiary for the term of twenty-five years. Having understood that, upon this plea, he was to be sentenced to imprisonment for only ten years, he prosecuted an appeal, which resulted in a reversal of the judgment. At the last trial the court set aside the plea of guilty of murder in the second degree — the accused having refused to withdraw it — and, against his objection, ordered a plea of not guilty to be entered in his behalf. Under the latter plea he was tried, convicted and sentenced to be hanged. By the law of Missouri at the time of the commission of Kring's offence, his conviction and sentence under the plea of guilty of murder in the second degree was an absolute acquittal of the charge of murder in the first degree. But that law having been changed before the final trial occurred, Kring contended that the last

statute, if applied to his case, would be within the prohibition of *ex post facto* laws. And that view was sustained by this court, four of its members dissenting.

In the opinion of the court in *Kring's case* reference was made to the opinion of Mr. Justice Chase in *Calder* v. *Bull*, and also to the charge of the court to the jury in *United States* v. *Hall*, 2 Wash. C. C. 366, 373. In the latter case Mr. Justice Washington said: "An *ex post facto* law is one which, in its operation, makes that criminal or penal which was not so at the time the action was performed; or which increases the punishment; or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage." He added: "If the enforcing law applies to this case, there can be no doubt that, so far as it takes away or impairs the defence which the law had provided the defendant at the time when the condition of this bond became forfeited, it is *ex post facto* and inoperative." Considering the suggestion that the Missouri statute under which Kring was convicted only regulated procedure, Mr. Justice Miller, speaking for this court, said: "Can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called the law of procedure? We think it cannot." In conclusion it was said: "Tested by these criteria, the provision of the constitution of Missouri which denies to plaintiff in error the benefit which the previous law gave him of acquittal of the charge of murder in the first degree on conviction of murder in the second degree, is, as to his case, an *ex post facto* law within the meaning of the Constitution of the United States."

A careful examination of the opinion in *Kring* v. *Missouri* shows that the judgment in that case proceeded on the ground that the change in the law of Missouri as to the effect of a conviction of murder in the second degree — the accused being charged with murder in the first degree — was not simply a change in procedure, but such an alteration of the previous law as took from the accused, after conviction of murder in the second degree, that protection against punishment for

murder in the first degree which was given him at the time of the commission of the offence. The right to such protection was deemed a substantial one — indeed, it constituted a complete *defence* against the charge of murder in the first degree — that could not be taken from the accused by subsequent legislation. This is clear from the statement in *Kring's case* that the question before the court was whether the statute of Missouri deprived "the defendant of any right of *defence* which the law gave him when the act was committed so that as to that offence it is *ex post facto*."

This general subject was considered in *Hopt* v. *Utah*, 110 U. S. 574, 588, 589. Hopt was indicted, tried and convicted of murder in the Territory of Utah, the punishment therefor being death. At the time of the commission of the offence it was the law of Utah that no person convicted of a felony could be a witness in a criminal case. After the date of the alleged offence, and prior to the trial of the case, an act was passed removing the disqualification as witnesses of persons who had been convicted of felonies. And the point was made that the statute, in its application to *Hopt's case*, was *ex post facto*.

This court said: "The provision of the Constitution which prohibits the States from passing *ex post facto* laws was examined in *Kring* v. *Missouri*, 107 U. S. 221. The whole subject was there fully and carefully considered. The court, in view of the adjudged cases, as well as upon principle, held that a provision of the constitution of Missouri denying to the prisoner, charged with murder in the first degree, the benefit of the law as it was at the commission of the offence — under which a conviction of murder in the second degree was an acquittal of murder in the first degree, even though such judgment of conviction was subsequently reversed — was in conflict with the Constitution of the United States. That decision proceeded upon the ground that the state constitution deprived the accused of a substantial right which the law gave him when the offence was committed, and therefore, in its application to that offence and its consequences, altered the situation of the party to his disadvantage. By the law as

established when the offence was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas, by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried and convicted of murder in the first degree, and subjected to the punishment of death. Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offence was committed. But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed." The court added: "The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offence, or the ultimate facts necessary to establish guilt, but — leaving untouched the nature of the crime and the amount or degree of proof essential to conviction — only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and

which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged."

At the present term, in *Thompson* v. *Utah*, 170 U. S. 343, this court observed, generally, that a statute is *ex post facto* which, by its necessary operation and in its relation to the offence or its consequences, alters the situation of the accused to his disadvantage. But it took care to add: "Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offence was committed. And, therefore, it is well settled that the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offence charged against him. Cooley in his Treatise on Constitutional Limitations, after referring to some of the adjudged cases relating to *ex post facto* laws, says: 'But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.'" c. 9, p. *272.

Applying the principles announced in former cases — without attaching undue weight to general expressions in them that go beyond the questions necessary to be determined — we adjudge that the statute of Missouri relating to the com-

parison of writings is not *ex post facto* when applied to prosecutions for crimes committed prior to its passage. If persons excluded, upon grounds of public policy, at the time of the commission of an offence, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute to be *ex post facto* which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offence was committed. The Missouri statute, when applied to this case, did not enlarge the punishment to which the accused was liable when his crime was committed, nor make any act involved in his offence criminal that was not criminal at the time he committed the murder of which he was found guilty. It did not change the quality or degree of his offence. Nor can the new rule introduced by it be characterized as unreasonable — certainly not so unreasonable as materially to affect the substantial rights of one put on trial for crime. The statute did not require "less proof, in amount or degree," than was required at the time of the commission of the crime charged upon him. It left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the State, as a condition of its right to take the life of an accused, must overcome the presumption of his innocence and establish his guilt beyond a reasonable doubt. Whether he wrote the prescription for strychnine, or the threatening letter to the church organist, was left for the jury, and the duty of the jury, in that particular, was the same after as before the passage of the statute. The statute did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused. Nor did it give the prosecution any right that was denied to the accused. It placed the State and the accused upon an equality; for the rule established by it gave

to each side the right to have disputed writings compared with writings proved to the satisfaction of the judge to be genuine. Each side was entitled to go to the jury upon the question of the genuineness of the writing upon which the prosecution relied to establish the guilt of the accused. It is well known that the adjudged cases have not been in harmony touching the rule relating to the comparison of handwritings: and the object of the legislature, as we may assume, was to give the jury all the light that could be thrown upon an issue of that character. We cannot adjudge that the accused had any vested right in the rule of evidence which obtained prior to the passage of the Missouri statute, nor that the rule established by that statute entrenched upon any of the essential rights belonging to one put on trial for a public offence.

Of course, we are not to be understood as holding that there may not be such a statutory alteration of the fundamental rules in criminal trials as might bring the statute in conflict with the *ex post facto* clause of the Constitution. If, for instance, the statute had taken from the jury the right to determine the sufficiency or effect of the evidence which it made admissible, a different question would have been presented. We mean now only to adjudge that the statute is to be regarded as one merely regulating procedure and may be applied to crimes committed prior to its passage without impairing the substantial guarantees of life and liberty that are secured to an accused by the supreme law of the land.

The judgment of the Supreme Court of Missouri is

*Affirmed.*